ORIGINAL

No. 91-7580

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

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GARY GRAHAM,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Gary Graham moves this Court for leave to file the attached Petition for Writ of Certiorari without payment of costs and to proceed in forma pauperis in this Court. An affidavit in support of this motion is being submitted to this Court under separate cover.

Respectfully Submitted,

Michael E Tigar

* Michael E. Tigar
Member, Supreme Court Bar

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512/471-6319

* Counsel of Record for Petitioner
GARY GRAHAM

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Gary T. Graham being first duly sworn, depose and say that I am the Petitioner in the above- entitled case; that in support of my motion to proceed without being required to repay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes___ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   N/A

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.

   Unknown

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes___ No X

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes___ No X
   If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No X

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are depending upon you for support and state your relationship to those persons.

   N/A

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Gary Graham

Subscribed and sworn to before me this 6th day of March 1992.

Notary

My commission expires 5-15-95

ORIGINAL

No. 91-7580

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY GRAHAM,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THIS IS A CAPITAL CASE

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QUESTIONS PRESENTED

May a State limit a capital sentencing jury's consideration of a seventeen-year-old defendant's youth, recognized repeatedly by this Court as a powerful mitigating factor, to answering whether he acted "deliberately" and might be dangerous in the future, and afford no other basis for taking his youth into account?

May a State similarly limit the jury's consideration of such a defendant's positive character traits and the unfortunate circumstances of his family background?

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY GRAHAM,

Petitioner,

v.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

Petitioner Gary Graham prays that this Honorable Court issue a Writ of Certiorari to review the judgment of the en banc United States Court of Appeals for the Fifth Circuit in his case.

CITATION TO OPINION BELOW

The en banc opinion of the United States Court of Appeals for the Fifth Circuit; denying habeas relief to Mr. Graham by a single vote (7-6), was announced on January 3, 1992, and has not

yet been reported. A copy of the printed slip opinion is annexed hereto as Appendix A.[1]

JURISDICTION

Mr. Graham invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Eighth Amendment to the United States Constitution, which reads in pertinent part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law;

and the former Texas capital sentencing statute, Tex. Code Crim. Proc. Art. 37.071 (Vernon's ed. 1989), which provided

> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

[1] The prior actions of the Court of Appeals concerning Mr. Graham's case are also annexed hereto. See Appendix B (Judgment); Appendix C (Opinion granting rehearing en banc); Appendix D (Opinion granting habeas relief on remand from this Court in light of Penry); Appendix E (original panel opinion denying habeas relief).

> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> . . . .
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. . . . .

STATEMENT OF THE CASE

En banc and by a vote of 7 to 6, the Fifth Circuit has, as the dissenting judges pointed out in two eloquent opinions, (a) undercut the rationale of decisions written or joined in by every member of this Court who has participated in a decided case involving jury discretion in capital sentencing; (b) introduced a new rule for evaluating mitigating evidence in capital sentencing; and (c) ignored this Court's insistence on informed and guided jury discretion in capital cases. Because the issues decided are central to Eighth Amendment jurisprudence and will surely recur, this Court should grant certiorari.

A. Course of Prior Proceedings

Mr. Graham was tried by a jury and found guilty of capital murder in the 182nd District Court of Harris County, Texas, in 1981. Tr. Vol. I at 63, 70-75. The jury answered "yes" to the statutory special issue questions and the trial judge sentenced Mr. Graham to death as required by Texas law. Id.; see former Tex. Code Crim. Proc. Art. 37.071 (Vernon's ed. 1989).

The Texas Court of Criminal Appeals affirmed Mr. Graham's conviction and sentence in an unpublished per curiam opinion on June 12, 1984. See Graham v. Lynaugh, 854 F.2d 715, 716 (5th Cir. 1988). In June, 1987, the trial court scheduled Mr. Graham's execution for July 30, 1987. Id. Mr. Graham sought habeas corpus relief in state postconviction proceedings, and his execution was postponed to permit review of the issues he had raised. Id. The state district court held an evidentiary hearing on January 8, 1988, and later recommended that Mr. Graham be denied relief. Id. The Texas Court of Criminal Appeals adopted the district judge's findings and denied relief on February 19, 1988. Id. at 717.

Mr. Graham's execution had been set for February 25, 1988, and he filed his petition for writ of habeas corpus in federal district court on February 23. Id. That court promptly denied relief and denied a certificate of probable cause to appeal. Id. Mr. Graham immediately appealed to the United States Court of Appeals for the Fifth Circuit and sought a certificate of probable cause. Id. That Court stayed Mr. Graham's execution, received briefs, and heard oral argument. Id. Relying on Jurek v. Texas, 428 U.S. 262 (1976) and this Court's then-recent decision in Franklin v. Lynaugh, 487 U.S. 164 (1988), the Court of Appeals rejected Mr. Graham's claim that the application of the Texas capital sentencing statute in his case violated the Eighth and Fourteenth Amendments by precluding the consideration of relevant mitigating evidence. Graham, 854 F.2d at 718-720.

Concluding that Mr. Graham had made no "substantial showing of the denial of a federal right," the Court of Appeals denied his application for certificate of probable cause. Id. at 723. However, because this Court had recently granted review in Penry v. Lynaugh, the Fifth Circuit stayed Mr. Graham's execution to permit him to petition this Court for certiorari. Id.

In Penry, this Court held that the former Texas capital sentencing statute, under which Mr. Graham was sentenced, unconstitutionally precluded juries in certain cases from considering and giving effect to mitigating evidence as required by the Eighth Amendment. Penry v. Lynaugh, 492 U.S. 302 (1989). In the wake of Penry, this Court vacated the Fifth Circuit's decision in Graham and remanded for reconsideration in light of Penry. Graham v. Lynaugh, 492 U.S. 915 (1989).

A panel of the Fifth Circuit, upon reconsideration, held that, in the informing light of Penry, the Texas special issue questions had not permitted the jury adequately to consider or give mitigating effect to Mr. Graham's youth and troubled family upbringing. Graham v. Collins, 896 F.2d 893 (5th Cir. 1990). Respondent obtained rehearing en banc. Graham v. Collins, 903 F.2d 1014 (5th Cir. 1990).

The en banc court heard oral argument on January 21, 1991, and handed down its decision on January 3, 1992. Its opinion, denying Mr. Graham relief under Penry, commanded a bare 7-6 majority. Appendix A. There were two dissents; in the first, five circuit judges concluded that consistent application of

Penry v. Lynaugh required reversal of Mr. Graham's death sentence. Graham, slip op. at 2028 (Reavley, J., joined by Politz, King, Davis, and Wiener, JJ., dissenting). In the second dissent, Judge Patrick Higginbotham noted that the majority's reasoning struck hard at the ideal of informed jury discretion in capital sentencing, and thus was inconsistent with the reasoned development of Eighth Amendment principles in this area, including particularly Penry. Id. at 2030 (Higginbotham, J., dissenting). This Petition followed.

B. Statement of facts

Bobby Grant Lambert was shot and killed at a Safeway Food Store in Houston, Texas, on May 13, 1981. S.F. Vol. XVI at 7-9, 66-69. Bernadine Skillern, who had been in the parking lot of the store with her three children at the time of the shooting, had seen a black man struggle with the victim and then fire a gun at him. S.F. Vol. XVII at 233-330. At trial, Ms. Skillern identified the defendant, seventeen-year-old Gary Graham, as the man she had seen shoot Mr. Lambert. Id. at 331.

After the jury returned its verdict of guilty of capital murder, the State presented its case for the death penalty. Tr. Vol. XIX at 74 - Vol. XX at 473. The defense called two mitigation witnesses. Id. at 475-487. First, Mr. Graham's step-father, Mr. Joe Samby, testified that Mr. Graham had always treated him with kindness and respect. Id. at 475. Mr. Samby testified that although young Gary lived with his father at that time, he often visited his mother and always responded eagerly to

requests for help. Id. at 477. For example, Mr. Samby recalled, Gary would cut the yard and help out his mother around the house. Id. In addition, Mr. Samby testified, by the time he was fifteen years old Gary had a job working with his father. Id. at 478. From his earnings, Mr. Samby testified, Gary purchased food and clothing for his own children. Id. at 479.

The second mitigation witness on Mr. Graham's behalf was his grandmother, Ms. Emma Chron. Id. at 481. Ms. Chron told the jury that Gary's mother had been plagued her whole life by mental illness, and that this "nervous condition" had required Gary's mother to seek hospitalization and treatment between twenty and thirty times. Id. at 482-483. As a result of his mother's illness, Ms. Chron explained, young Gary had been frequently moved from one relative's home to another. Id. Despite these constant moves and a consequent lack of parental care and guidance, she added, Gary Graham had gone to church "all the time," because "he loved the Lord," and had never given her any problems when he was in her care. Id. at 485-487.

At closing argument in the penalty phase, defense counsel argued for "compassion" for this "young man" as a "human being." Id. at 489-495. Counsel emphasized Mr. Graham's youth: "A young man, hasn't even reached twenty years old. Not even twenty years old. He goes on a rage for seven days, seven days out of his life. . . . Gary Graham, seventeen years old, went on a rage for seven days." Id. at 492, 494. Because of Graham's youth,

counsel urged, the jury should "find some compassion for that human being," and give him a life sentence. Id. at 495.

Mr. Graham's other defense attorney echoed these same themes:

> [When] you look at a young man of his age, what do you think about? What do you think about the years when you think about death? You think about finishing the years of your life back when you are at a point in your life when some people have no direction. Some people have no knowledge of where they're going or what they want to do. . . . You also have to look at changes in society. Changes in ages. . . . When you are 17 to 20, you are young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. . . . [T]here is something about human nature that not only changes you, but slows you down as you live. If you live. If you live. I'm asking you, ladies and gentlemen, to give the man a chance to live. . . . I ask you for Gary Graham's life.

Id. at 499-504.

In response, the district attorney reminded the jury that they had taken an oath to follow the law, and that the special issue questions were all they were permitted to answer. Id. at 504-510. He argued that Mr. Graham's youth increased the likelihood of his future dangerousness, requiring an affirmative answer to the second special issue:

> Gary Graham does have direction, and he has shown you that direction. He has shown you that direction in every way that you can possibly look at. And I stand before you now and I ask you on your oath as jurors to follow the law. . . . They ask you to look at his youth. . . . The seeds of our past are the harvest of the future and what seeds has Gary Graham planted? . . . His seeds are death. Pain. Suffering. Humiliation. Degradation. . . . Under the evidence and beyond a reasonable doubt it is the only proper verdict. Yes, special issue number one. Yes, to special issue number two. . . . and the death of Gary Graham.

Id. The jury answered the special issues in the affirmative, and the court sentenced Mr. Graham to death. Tr. Vol. I at 70-75.

REASONS THIS COURT SHOULD GRANT THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT BELOW DISREGARDED THE TEACHING OF PENRY V. LYNAUGH, 492 U.S. 302 (1989), IGNORED WHAT THIS COURT AND ITS MEMBERS HAVE WRITTEN IN MANY CONTEXTS ABOUT THE SIGNIFICANCE OF YOUTH IN CAPITAL SENTENCING, UNDERCUT THIS COURT'S EFFORTS TO DEVELOP PRICIPLES OF GUIDED JURY DISCRETION IN CAPITAL CASES, AND CREATED A STARTLING ANOMALY IN THE APPLICATION OF TEXAS' DEATH PENALTY LAW.

Gary Graham was seventeen years old at the time of the crime for which he waits to die. Almost every member of this Court has recognized, as have many other courts, that the fact of a defendant's youth is a powerfully significant mitigating factor which can, alone, support a sentence less than death. The Court of Appeals, however, held that apart from its relationship to the "deliberateness" of his actions and the probability that he would be dangerous in the future, seventeen-year-old Gary Graham's youth was **"not mitigating,"** and he was not entitled to have the jury consider it in assessing punishment. Graham v. Collins, ___ F.2d ___, slip op. at 2024. The Court of Appeals' conclusion, which commanded only the narrowest of majorities[2], is without support in this Court's Eighth Amendment decisions, and distorts the constitutional principles of jury discretion and individualized sentencing in capital cases. This Court should grant the writ to correct the Fifth Circuit's intolerably

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[2] The en banc Fifth Circuit denied habeas relief by a vote of 7-6, with two judges recently appointed to the Court not participating. See Appendix A.

erroneous misapplication of Penry v. Lynaugh, 492 U.S. 302 (1989), and reverse Mr. Graham's sentence of death.

A. Almost every sitting Justice of this Court who has authored or joined an opinion concerning the effect of youth on the decision to execute an offender has agreed that youth is a mitigating factor.

If a single mitigating factor has been universally recognized as indispensably relevant to the choice between life and death, it is the youth of the defendant. Almost every member of the present Court has acknowledged this basic principle of capital sentencing. For example, In this Court's very first decision reaffirming the constitutionality of capital punishment after Furman[3], Justice Stevens acknowledged that a capital defendant's youth would mitigate against the imposition of the ultimate penalty:

> In addition, the jury's attention is focused on the character of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against the imposition of capital punishment (**e.g., his youth,** ...)

Gregg v. Georgia, 428 U.S. 153, 197 (Stewart, J., joined by Powell and Stevens, JJ., announcing the opinion of the Court). Two Terms later, Justice Stevens again confirmed the centrality of youth as a mitigating factor in the touchstone case of Lockett v. Ohio, 438 U.S. 586 (1978). The Ohio capital setencing statute failed under the Eighth Amendment because it precluded the jury from considering mitigating evidence except as that evidence bore

[3] Furman v. Georgia, 408 U.S. 238 (1972).

on three narrow questions. See Lockett, 438 U.S. at 607. This Court held that scheme unconstitutional because, inter alia, "considerations of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." Lockett, 438 U.S. at 608 (emphasis added).

When a majority of this Court later adopted Lockett's plurality holding, it again specifically emphasized the critical importance of a defendant's youth as evidence mitigating against the death penalty. In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court distinguished "the chronological age of a minor" from the attendant infirmities of youth, and held that a constitutional capital sentencing statute had to permit the sentencer to consider and give effect to both. As the Court explained,

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of sixteen years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant. The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage . . . [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the

> background and mental and emotional development of a youthful defendant be duly considered in sentencing.

455 U.S. at 115-116 (all emphases added).[4] Justice O'Connor concurred, noting that the defendant's status as a minor required that the Court take "extraordinary measures" to ensure that his evidence in support of a life sentence be fully and fairly considered. See Eddings, 455 U.S. at 118 (O'Connor, J., concurring).

Three Terms ago, this Court considered whether the Eighth Amendment permitted the execution of seventeen-year-old capital defendants at all; Justice Scalia rested this Court's holding that the Constitution erects no such per se bar on the condition that "individualized consideration is a constitutional requirement [in capital cases],... and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age."[5] Stanford v. Kentucky, 492 U.S. 361,

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[4] See also Eddings, 455 U.S. at 122 (Burger, C.J., dissenting) (noting that trial court had "taken account of Eddings' unfortunate childhood," and did not conclude that "either [Eddings'] youth or his family background was sufficient to offset the aggravating circumstances....") (emphasis added).

[5] This Court's conclusions with respect to the powerful mitigating relevance of a capital defendant's youth have been echoed by numerous courts. See, e.g., State v. Valencia, 645 P.2d 239, 241 (Ariz. 1982) ("[youth] is a substantial and relevant factor which must be given great weight"); People v. Frank, 798 P.2d 1215 (Cal. 1990) ("[youthfulness] may well constitute a significant mitigating factor"); Brown v. Francis, 326 S.E.2d 735 (Ga. 1985); Finney v. State, 320 S.E.2d 147 (Ga. 1984); State v. Searcy, 798 P.2d 914, 921 (Idaho 1990) (defendant's youth, even when murder manifested "exceptional depravity," is "sufficient to avoid capital punishment"); Ice v. Commonwealth, 667 S.W.2d 671, 680 (Ky. 1984) ("There is no (continued...)

375 (1989) (emphasis added). Justices White and Kennedy, and the Chief Justice, joined Justice Scalia in affirming this basic principle.

Stanford also makes manifest the Court of Appeals' error in holding that Mr. Graham's youth was "not mitigating" except as it bore on the "deliberateness" of his actions and the likelihood of his future dangerousness.[6]

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[5](...continued)
question but that [the defendant]'s young age at the time of the offense is an important factor in his case that should have been given serious consideration ... at the sentencing phase"); State v. Barber, 753 S.W.2d 659, 669 (Tenn. 1988) (jury was entitled to find defendant's youth mitigating even when he was 29 years old); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (defendant's young age [17] "is a powerful mitigating circumstance"); Moore v. Balkcom, 716 S.W.2d 1511, 1524 (11th Cir. 1983) (age of 23 is mitigating); Hill v. Lockhart, 927 F.2d 340, 343 (8th Cir. 1991) ("[t]he determination whether an individual qualifies as a youth for purposes of mitigating against the death penalty is a subjective one appropriately made by a properly instructed jury"); High v. Kemp, 819 F.2d 988, 993 (11th Cir. 1987) ("society's standards of decency" compel "consideration of an eighteen year old's youth as a mitigating factor").

[6] It is important to note that the Court of Appeals did not conclude that, as a matter of fact, the mitigating relevance of Mr. Graham's youth was "outweighed" by the evidence in aggravation (such a conclusion would have been inconsistent with the actual manner in which the former Texas statute operated, but at least would have been grounded in this Court's Eighth Amendment decisions). Instead, the Fifth Circuit held that, as a matter of law, Mr. Graham's age of seventeen was irrelevant except as it tended to disprove one of the "special issue" questions the jury was required to answer. The Constitution forbids such a limitation; see Eddings, 455 U.S. at 113-114.

B. The Court of Appeals' majority validates a sentencing scheme that so unfairly limits jury discretion that no state (including Texas) now permits execution of youthful offenders under so begrudging a standard.

At the time Penry was argued, only Texas and Oregon had capital sentencing statutes as narrowly drawn as the one before the Court. Oregon's highest court has since recognized that Penry dooms their statute. See State v. Wagner, 786 P.2d 93 (Or. 1990) (Opinion on remand from this Court in light of Penry).[7]

The Texas legislature has also responded to Penry, with a new capital sentencing statute that expressly incorporates the concept of jury discretion commanded by this Court's decisions. See, e.g., Boyde v. California, 494 U.S. 370 (1990) (upholding California capital sentencing statute because it permitted the jury to consider all mitigating evidence in determining sentence, including evidence not connected to the crime itself); Hitchcock v. Dugger, 481 U.S. 393 (1987) (striking down death sentence imposed under former Florida statute that limited jury consideration of mitigating circumstances).

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[7] See also State v. Rose, 810 P.2d 839 (Or. 1991) (vacating death sentence under Wagner and Penry); State v. Walton, 809 P.2d 81 (Or. 1991) (same); State v. Pinnell, 806 P.2d 110 (Or. 1991) (same); State v. Stevens, 806 P.2d 92 (Or. 1991) (same); State v. Douglas, 800 P.2d 288 (Or. 1990) (same); State v. Simonsen, 798 P.2d 241 (Or. 1990) (same); State v. Guzek, 797 P.2d 1031 (Or. 1990) (same); State v. Smith, 791 P.2d 836 (Or. 1990) (same); State v. Nefstad, 789 P.2d 1326 (Or. 1990) (same); State v. Montez, 789 P.2d 1352 (Or. 1990) (same); State v. Moen, 786 P.2d 111 (Or. 1990) (same); State v. Miranda, 786 P.2d 155 (Or. 1990) (same); State v. Farrar, 786 P.2d 161 (Or. 1990) (same).

The new Texas statute retains the "special issue" format,[8] but with one vitally important difference: if the jury answers the "aggravating" special issues affirmatively, it must then answer

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's charcter and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Tex. Code Crim. Proc. Art. 37.071, § 2 (b) (1), § 2 (b) (2), § 2 (e).[9]

Had Mr. Graham been sentenced under this post-Penry Texas capital sentencing scheme, his lawyer's arguments would have been permitted the dignity and force the Eighth Amendment requires, with instructions focusing the jury's attention on Mr. Graham's mitigating evidence. A reasonable juror could then have voiced her "reascned moral response" to the seventeen-year-old offender by voting to impose a life sentence, rather than the death penalty. This strong inference underscores the injustice

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[8] The current Texas capital sentencing statute in fact retains only the second special issue (the "future dangerousness" question) from the former statute. See Tex. Code Crim. Proc. Art. 37.071 (b) (1) (Vernon's ed. 1992). In cases prosecuted under the law of parties (pursuant to Tex. Penal Code §§ 7.01, 7.02), the new statute poses an explicit Enmund inquiry ("whether the defendant actually caused the death of the deceased or did not actually kill the deceased but intended to kill the deceased or another or anticipated that a human life would be taken"); see Enmund v. Florida, 458 U.S. 782 (1982).

[9] The new statute defines "mitigating evidence" as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." Id., § 2 (f) (4).

resulting from the death sentence imposed on Mr. Graham under the regime condemned in Penry.[10]

Thus, even Texas has now repented of the unfairly limited statute under authority of which Mr. Graham is condemned to die. Every State that permits executions has thus, through its representatives and its judges, come to understand the need for informed and guided jury discretion to take account of this most significant determinant of appropriate punishment, and the Texas legislature is only the most recent to revise its capital sentencing statute to comply with the lessons of human experience. Against this array, only the Attorney General of the State of Texas continues to defend the former Texas capital sentencing statute as constitutionally adequate in cases such as Mr. Graham's.

C. The Court of Appeals' majority erred in its conclusion that Mr. Graham's jury could properly be denied the discretion to impose a life sentence based on his mitigating evidence of youth.

The majority of the court below reduced Penry to "addressing only a situation where some major mitigating thrust of the evidence is substantially beyond the scope of the special issues." Graham, slip op. at 2019 (emphasis added). In one fell swoop, the Court of Appeals has thus rewritten Penry (and, in

[10] The opinion of the court below notes some uncertainty concerning the present provisions of the Texas capital sentencing statute, as recently amended to comply with Penry v. Lynaugh, 492 U.S. 302 (1989). See Graham, slip op. at 2001 n.1. Art. 37.071, Tex. Code Crim. Proc. (Vernon's ed. 1992) resolves any question about the state of the law.

turn, Lockett and Eddings) to impose two additional requirements before a Texas capital defendant may claim Eighth Amendment error. First, the Fifth Circuit decreed, the defendant's evidence must have a "major mitigating thrust" that is beyond the scope of the narrow "special issue" interrogatories. Second, the degree by which this "mitgating thrust" exceeds the scope of the special issues must be "substantial."

These additional requirements find no basis in any decision of this Court. The majority seems to have reverted to a pre-Penry understanding of Jurek v. Texas, 428 U.S. 262 (1976), to conclude that habeas relief for Mr. Graham is unwarranted because "no 'major thrust' of any of the mitigating evidence ... is not relevant to support a negative answer to the second special issue." Graham, slip op. at 2019.

In short, according to the majority, Mr. Graham received his constitutional due because all his mitigating evidence -- his youth, and the circumstances of his upbringing -- either (1) was relevant to support a "no" answer to the future dangerousness question, or (2) had no "substantial thrust" beyond those questions. This conclusion is not only at odds with Penry; it ignores the constitutionally-mandated manner in which jury discretion must be guided in capital sentencing.

According to the Fifth Circuit, if a juror believed that Mr. Graham's youth was the reason he committed his offense, that juror could give effect to that conclusion by answering "no" to the "future dangerousness" question. Graham, slip op. at 2024

("whatever is mitigating about youth tends to lend support to a "no" answer to the second special issue"). Conversely, if the juror did not believe that Mr. Graham's youth was the cause of his violent behavior, then Mr. Graham was not entitled to have that juror consider his youth in mitigation, for "youth is not mitigating with respect to conduct not attributable to it." Graham, slip op. at 2024.[11]

This holding requires review in this Court for at least two reasons. The Court of Appeals erred, as dissenting Judge Patrick Higginbotham recognized, because it failed to apply this Court's consistent teaching about informed and guided jury discretion in capital sentencing. This Court has never held that a capital offense must be "attributable" to a defendant's mitigating facts before the constitution entitles him to their full and independent consideration. It is puzzling that Graham cites Boyde v. California, 494 U.S. 370, 108 L.Ed.2d 316 (1990), for this proposition.[12] Indeed, Boyde holds the opposite; Boyde upheld the challenged California jury instructions precisely because they did not preclude the jury's consideration of mitigating evidence -- in particular, evidence that was not linked to the commission of the crime:

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[11] The Court of Appeals twice emphasized its rationale: "We reject the contention that ... the jury may believe that youth mitigated the defendant's culpability though not his future dangerousness;" "[t]o the extent Graham's criminal conduct was not attributable to his youth, his youth neither reduced his culpability nor his future dangerousness." Graham, slip op. at 2024.

[12] See Graham, slip op. at 2024.

> Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other factors listed in [the statute] **allow for consideration of mitigating evidence not associated with the crime itself, such as** the absence of prior criminal activity by a defendant, the absence of prior felony convictions, **and youth.** When [the challenged instruction] is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence.

Boyde, 108 L.Ed.2d at 331 (emphasis added).[13] In Boyde, the petitioner had contended that "none of the 11 statutory factors in [the California sentencing statute] allowed the jury to consider non-crime-related factors, such as his background and character, which might provide a basis for a sentence less than death." Id. at 327. This Court rejected Boyde's claim because it determined that the jury could consider non-crime-related mitigating evidence under the challenged instruction, not because the non-crime-related evidence itself was not constitutionally protected.[14]

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[13] This passage from Boyde alone destroys Graham's "attribution" doctrine. Instead, as this Court acknowledged in Boyde, evidence of youth is "mitigating evidence not associated with the crime itself;" that is, the fact of youth has independent mitigating value.

[14] This conclusion follows as well from Justice O'Connor's opinion in South Carolina v. Gathers:

> In this case, the sentencing jury heard testimony from [the defendant's] mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. Gathers' sixth grade teacher testified that he was a quiet and affectionate child. . . .

(continued...)

Capital trials are bifurcated so that the guilt/innocence decision is made upon properly limited evidence and instructions. In the punishment phase, the relevancy door swings open much wider. The Court of Appeals' decision would condition relevancy decisions by requiring the defendant to show some extra measure of probative force beyond a rational relationship between his mitigating evidence and the jury's choice between life and death. As we have said, this view finds no support in this Court's decisions. More significantly, the Court of Appeals applies its reasoning to a mitigating factor that every sitting Justice who has written or joined an opinion on the issue, and every State including Texas in its post-Penry statute, recognizes is significant to the jury's capital sentencing decision.

The Court of Appeals also failed to follow Penry by refusing to see evidence of youth as "two-edged" under the former Texas sentencing scheme. Mr. Graham's youth, like Mr. Penry's mental retardation, was a "two-edged sword;" that is, it indicated a

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[14](...continued)
None of this evidence was directly relevant to the events of September 13, 1986 [the date of the crime], but all of it was relevant to the jury's assessment of the defendant and his moral blameworthiness.

Id., 490 U.S. 805, 817-818 (1989) (O'Connor, J., dissenting on other grounds) (emphasis added). The same principle animates this Court's decision in Payne v. Tennessee, ___ U.S.___, 111 S.Ct. 2597, 2608 (1991) (noting that although none of the defendant's mitigating evidence -- including his low IQ, his "affectionate and caring" attitude toward his girlfriend s children, and his parents' account that he was a "good son" -- was related to the circumstances of the offense, he was constitutionally entitled to its consideration by the jury).

likelihood that he would be dangerous in the future, even as it intuitively mitigated in support of a sentence less than death. See Penry, 492 U.S. at 324; cf. Graham, slip op. at 2019 (asserting that the "'major thrust' of any of [Graham's] mitigating evidence" supports "a negative answer to the second special issue"), 2025 n.8 ("We reject Graham's contention in this court that his ... youth itself favored an affirmative answer to the second special issue"). This error has decisive consequences for the majority's ultimate conclusion; given the de minimis quality of the inquiry of the first special issue, see Penry, 492 U.S. at 322-323, it is precisely because Mr. Graham's youth was a "two-edged" sword, and thus could not be given any mitigating effect under the second special issue, that his death sentence must fall.

The Fifth Circuit's conclusion that youth is not "two-edged" in this way is wrong. Mr. Graham's jury was given neither definitions of key terms nor additional instructions to guide its deliberations concerning the second special issue;[15] in the absence of such guidance a reasonable juror could have concluded that Mr. Graham's youth made it at least somewhat more likely that he might commit a criminal act of violence in the future.

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[15] See Jurek, 428 U.S. at 272 (noting that "[t]he Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as 'criminal acts of violence' or 'continuing threat to society'"). Fifteen years after Jurek, the Texas Court still "has yet to define" the terms of the second special issue. This deficiency makes it even likelier that a reasonable juror could have believed that Mr. Graham's youth required an affirmative answer to the "continuing threat" inquiry.

As one judge on the Texas Court of Criminal Appeals itself has recognized,

> ... in answering [the "future dangerousness" inquiry], a jury would decidedly consider the range and severity of the defendant's prior criminal conduct; yet truly "mitigating" evidence -- such as a mental disease or defect, a deprived, abusive childhood or the youth of the defendant -- while mitigating against a death sentence in general, surely has tremendous specific probative weight in favor of answering the future dangerousness question "yes."

Stewart v. State, 686 S.W.2d 118, 125 (Tex. Crim. App. 1984), (Clinton, J., dissenting) (emphasis added); see also Eddings, 455 U.S. at 126 n. 8 (Burger, C.J., dissenting) (citing studies indicating that a majority of violent youths do not, in fact, become less violent as they grow older). Because the Fifth Circuit erroneously held the opposite, however, it missed the strongest parallel between Penry and Graham.

Besides refusing to acknowledge that youth is "two-edged" evidence under the former Texas capital sentencing statute as described in Penry, the majority of the court below offered an alternative description of its new rationale limiting the reach of Penry: that evidence of any condition which is, by its nature, transitory could adequately be considered and given effect in answering the second special issue. See Graham, slip op. at 2027 (only evidence of "an essentially permanent adverse change in character (e.g., brain damage)" renders the former Texas statute constitutionally inadequate as applied) (emphasis in original); see also Graham, slip op. at 2028 (Reavley, J., joined by Politz,

King, Davis, and Wiener, JJ., dissenting) (describing this aspect of the majority opinion as "hold[ing] that no instruction or jury decision is needed for transitory circumstances of mitigation").

Simply because a mitigating circumstance is transitory does not render it unproblematic under the former Texas capital sentencing statute. For example, this Court regarded Penry's history of child abuse as mitigating "beyond the scope" of the special issues, since it might have rendered him less able to control his behavior as an adult. Penry, 492 U.S. at 322-323, 324.[16] Yet, it is increasingly evident that the destructive consequences of child abuse, while severe and long-lasting in proportion to the degree of abuse suffered, can be ameliorated -- even cured -- by various therapies.[17] Accordingly, under the rule of Graham, evidence of child abuse would present no problem

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[16] The Fifth Circuit itself recognized as much in its only opinion granting relief under Penry to date: Mayo v. Collins, 920 F.2d 251 (5th Cir. 1990), modifying Mayo v. Lynaugh, 893 F.2d 683 (5th Cir. 1990); cert. denied, ___ U.S.___, 116 L.Ed.2d 225 (1991) (evidence of an abused childhood requires additional jury instruction under Penry).

[17] See, e.g., Hansen, et al., [Treatment of] Victims of Child Physical Abuse, in Ammerman and Hersen, eds., Treatment of Family Violence (1990); Coons, P.M., Child abuse and multiple personality disorder: Review of the literature and suggestions for treatment, 10 Child Abuse and Neglect 449 (1986); Davidson, et al., Treatment of Posttraumatic Stress Disorder with Amitriptyline and Placebo, 47 Gen. Psychiatry 259 (1990); Friedman, Toward Rational Pharmacotherapy for Posttraumatic Stress Disorders: An Interim Report, 145 Am. J. Psychiatry 281 (1988); Famularo, et al., Propranolol Treatment for Childhood Posttraumatic Stress Disorder, Acute Type: A Pilot Study, 142 Am. J. Dis. Child. 1244 (1988).

under Penry, since its effects are at least arguably "transitory."[11]

D. Mr. Graham's jury could not properly be denied the discretion to impose a life sentence based on his mitigating evidence of positive character traits, religious faith, and a troubled family environment.

The evidence presented at Mr. Graham's trial in support of a life sentence was not limited to his young age. During the sentencing phase, witnesses also recounted the troubled circumstances of Mr. Graham's childhood, his devotion to his children, and his religious faith. Tr. Vol. XX at 475-486, 479, 485. This evidence was constitutionally protected mitigating evidence under every decision of this Court from Woodson to date. The court below, however, held that such evidence, "wholly typical of what might be expected in a vast number of cases," had no relevance to the appropriateness of a death sentence for Mr. Graham beyond its probative value in determining his future dangerousness. See Graham, slip op. at 2026-2027. Because such evidence "has no tendency to reduce culpability for the particular crime charged in any way not encompassed within one or more of the special issues," the Fifth Circuit concluded, there was no Eighth Amendment error in the jury's inabilty

[11] This discussion, like that of the "two-edged" quality of youth under the second special issue, see supra, highlights the constitutional deficiency of the second special issue and the reason for that inadequacy: the absence of any definitional instructions guiding the jury in applying such broad concepts as "criminal acts of violence" and "continuing threat to society." (I.e., an instruction defining with clarity and precision the time horizon involved in the prediction of future behavior could solve the problem presented by such "transitory" impairments).

independently to base a life sentence on Mr. Graham's evidence of postitive character traits. Id. This aspect of Graham, like its treatment of Mr. Graham's mitigating evidence of youth, is without support in the decisions of this Court. This Court should grant review to correct this misapplication of Penry and Franklin v. Lynaugh, 487 U.S. 164 (1988).

E. Facts illuminating a capital defendant's background and character are constitutionally protected mitigating evidence, upon which a properly instructed jury could reasonably base a decision to impose a life sentence rather than the death penalty.

Like evidence of youth, evidence of love for one's family, an unsupervised childhood, and religious devotion have all been recognized as constitutionally protected mitigating factors which can justify a life sentence rather than the death penalty. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987) (evidence that defendant was a "loving uncle" to his nieces and nephews was constitutionally mitigating; jury was required to have a vehicle for independent consideration of such evidence in support of a life sentence); Franklin v. Lynaugh, 487 U.S. 164, 186 (1988) (O'Connor, J., concurring) (noting that "religious devotion," "voluntary servitude," and "acts of kindness" were mitigating, and suggesting that the former Texas statute could be unconstitutional as applied in a case presenting such evidence); see also Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986) (evidence that capital defendant "was a loving son who cared deeply for his mother" constitutionally mitigating).

Considering whether Mr. Graham's mitigating evidence of religious devotion, acts of kindness to his family, and unsupervised upbringing could have been given effect under the former Texas capital sentencing statute, the court below reached two separate conclusions. First, it held that the "principal mitigating thrust" of Mr. Graham's acts of kindness, love and support for his children, and religious devotion "[could] adequately be given effect under the second special issue." Graham, slip op. at 2026 (emphasis added). With respect to Mr. Graham's lack of a structured home environment as a child, the Court of Appeals noted that "[i]n an appropriate context, evidence of this general kind might well form part of a proper Penry presentation," but then rejected Mr. Graham's Eighth Amendment claim because there was no "substantial" evidence of the impact of his broken home upon Mr. Graham's mental and emotional development. Graham, slip op. at 2027. According to this Court's prior decisions, the Fifth Circuit is wrong on both counts.

F. The former Texas special issues denied the jury an opportunity to express its reasoned moral response to Mr. Graham's mitigating evidence of positive character traits and difficult family circumstances.

The Graham court concluded that the mitigating relevance of Mr. Graham's acts of kindness, love and support for his children, and religious devotion was exhausted by their probative value in support of a negative answer to the second special issue. Graham, slip op. at 2026-2027. Graham's holding ignores this

Court's anticipation in Franklin that evidence of "voluntary service, kindness to others, [and] religious devotion" may be relevant to a defendant's moral culpability beyond the scope of the unfocused, undefined "future dangerousness" inquiry. See Franklin, 487 U.S. at 186 (O'Connor, J., concurring).

Mr. Graham's evidence of religious faith and concern for his children could not be given full and independent mitigating weight under the special issues. While these facts about Mr. Graham's character and record arguably may have had some relevance to the "future dangerousness" question, their relevance to the appropriateness of a death sentence is not exhausted by that slender probative value. See Graham, slip op. at 2028-2030 (Reavley, J., joined by Politz, King, Davis, and Wiener, JJ., dissenting) (noting that the "facts of a defendant's life ... may reach the much broader ultimat_ question: Is death the appropriate response to this human being, considering his moral culpability as a person?"). A reasonable juror could have concluded, given the lack of any guidance concerning the terms of the second special issue, that an affirmative answer was required.[19] Despite this conclusion, however, that same juror could have reasoned that the fact that Mr. Graham had regularly

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[19] This conclusion is compelled by the fact that the testimony at Mr. Graham's trial established that these mitigating factors existed before Mr. Graham committed his capital crime (as must be the case in many capital sentencing hearings). In other words, even if the jury had accepted the testimony of Mr. Graham's mitigating witnesses as entirely true, they would also have had to admit that Mr. Graham had committed acts of violence since those acts of kindness and service, and thus could not give this evidence independent mitigating weight.

attended church, "loved the Lord" and worked hard to provide his children food and clothing made him less deserving of death than a defendant who had never exhibited any such positive qualities -- notwithstanding the likelihood that he might commit a criminal act of violence at some undetermined point in the future. Limited to the special issue questions of the former Texas capital sentencing statute, however, such a juror could not give effect to this conclusion by imposing a life sentence. The statute thus precluded jurors from giving any independent mitigating weight to this evidence of Mr. Graham's valuable human qualities, and from expressing their reasoned moral response to this evidence by voting for a life sentence. The Fifth Circuit's treatment of this evidence is inconsistent with Franklin, Penry, and this Court's other decisions requiring that a capital sentencing jury be permitted to exercise informed, guided discretion in the imposition of sentence.

The Fifth Circuit also held that Mr. Graham's evidence concerning his mother's mental illness, and the circumstances of his upbringing, was not "substantial" enough to implicate the concerns of Penry. Graham, slip op. at 2027. The majority's conclusion, again, ignores the properly discretionary character of the sentencing decision in capital cases, and the indispensable role of mitigating evidence in the reliable and individualized determination of sentence. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 306 (1987) ("[a State] cannot limit the sentencer's consideration of any relevant circumstance that could

cause it to decline to impose the [death] penalty"). Perhaps equally important, common sense suggests that jurors need not be told explicitly that a youth from a broken home, with a mother hospitalized for treatment of her mental illness twenty to thirty times, who as a result was frequently shuttled among relatives, could develop mental and emotional handicaps as a result. The Fifth Circuit's conclusion to to the contrary, see Graham, slip op. at 2027 ("the evidence as a whole is simply not comparable to that in Penry or Eddings") sidesteps the principles of Penry and Lockett. This Court should grant review to address whether a reasonable juror could have determined, based on Mr. Graham's mitigating evidence of positive character traits and an unstructured home environment, that his moral culpability did not justify a death sentence, even if that same juror would have answered both special issues "yes."

II. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY AND ENFORCE THE MANDATE OF LOCKETT, EDDINGS, AND PENRY.

This case presents an opportunity to give the federal courts and the Texas Court of Criminal Appeals needed guidance on the application of Penry v. Lynaugh, 492 U.S. 302 (1989). The Texas Court of Criminal Appeals and the lower federal courts have too often seen Penry as simply a "mental retardation case," without wider implications for the role of guided jury discretion in capital sentencing. In the court below, Judge Patrick Higginbotham's brief dissenting opinion highlights this broader, yet more essential, issue. Judge Higginbotham acknowledges the

tension between the challenge of Furman -- to limit arbitrariness and caprice in the imposition of the ultimate penalty -- and the command of Penry: that the jury be permitted to express its "reasoned moral response" to the defendant and his mitigating evidence in imposing sentence. See Graham, slip op. at 2030-2031 (Higginbotham, J., dissenting). While noting that the jury's sentencing verdict is a "quintessential blackbox decision," yielding to "no logical or explainable divisor," Judge Higginbotham concluded that a properly instructed jury could have determined that, "although Graham acted deliberately, and is likely to do so again, when Graham's tender years and family circumstances are entered in the account of moral culpability, a death sentence is not warranted." Id. at 2031.

Judge Higginbotham's dissenting opinion well illustrates how this Court's decisions requiring jury discretion in capital sentencing are informed by tradition, precedent, and logic. Thus viewed, Penry instructs the States about the need to give jurors ample but guided opportunity to vote against death, having reference always to "the experience of mankind, as well as the long history of our law" as the compass for divining those "diverse frailties of humankind" which may serve as relevant mitigating factors.[20] Penry addresses the application of the Texas capital sentencing statute in such contexts, expressly left open for further discussion by Jurek.

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[20] Goss v. Lopez, 419 U.S. 565, 590 (1975) (Powell, J., dissenting); Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

In the view of most of the courts which have interpreted it, however, Penry applies only in the most exceptional cases. For example, the Texas Court of Criminal Appeals has reversed only those cases in which evidence of mental retardation was presented as a mitigating factor. See, e.g., Ex Parte Modden, No. 69,442 (Tex. Crim. App. February 12, 1992).[21] Having missed Penry's broader implications concerning jury discretion in capital sentencing, the Texas Court has turned this Court's actual Penry holding on its head -- enforcing a de facto prohibition on the execution of mentally retarded offenders, and failing to acknowledge that evidence of any other mitigating factor, no matter how extensive or compelling, can require resentencing. See, e.g., Lackey v. State, 816 S.W.2d 392 (Tex. Crim. App. 1991) (evidence of "disadvantaged background and emotional and mental problems," including "extremely substandard IQ scores and very

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[21] See also Ex Parte Bell, ___ S.W.2d ___, No. 57,898 (Tex. Crim. App., November 6, 1991); Ex Parte McGee, 817 S.W.2d 77 (Tex. Crim. App. 1991); Ex Parte Goodman, 816 S.W.2d 383 (Tex. Crim. App. 1991); Ramirez v. State, 815 S.W.2d 636 (Tex. Crim. App. 1991). The sole exception is Gribble v. State, 808 S.W.2d 65 (Tex. Crim. App. 1990) (mitigating evidence of psychosexual fantasy which, when combined with drug or alcohol consumption, caused violent behavior, required resentencing under Penry). Gribble today survives only in dissenting opinions; see, e.g., Boyd v. State, 811 S.W.2d 105, 130 (Tex. Crim. App. 1991) (Clinton, J., joined by Maloney, J., dissenting); Black v. State, 816 S.W.2d 350, 376 (Tex. Crim. App. 1991) (Clinton, J., dissenting); Ex Parte Earvin, 816 S.W.2d 379, 381 (Tex. Crim. App. 1991) (Clinton, J., joined by Maloney, J., dissenting); Ex Parte Baldree, 810 S.W.2d 213, 220 (Tex. Crim. App. 1991) (Baird, J., dissenting).

poor school record" and "a turbulent childhood and troubled relationship with his stepfather," not Penry-problematic).[22]

The lower federal courts have likewise failed to see the constitutional infirmity in the former Texas capital sentencing statute's limitation on the jury's discretion to impose a life sentence based on relevant mitigating circumstances. See, e.g., Graham; DeLuna v. Lynaugh, 890 F.2d 720, 722 (5th Cir. 1989) (denying relief under Penry because "appellant makes no claim that he was abused as a child ... [and] appellant has not shown any evidence of mental retardation"); Wilkerson v. Collins, __ F.2d___, No. 91-2879 (5th Cir. January 6, 1992) (evidence of youth [age 19] not problematic under Penry, citing Graham); Clark v. Collins, ___F.2d ___, No. 92-2036 (5th Cir. January 16, 1992) (adopting district court opinion that evidence of alcoholism and remorse not problematic under Penry); Cordova v. Collins ___ F.2d __, No. 92-2037 (5th Cir., January 21, 1992), slip op. at 2480 (evidence that defendant was "drinking heavily" at the time of the offense, drank frequently, and "act[ed] crazy" when drunk,

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[22] See also Ex Parte Harris (David), ___ S.W.2d ___, No. 71,179 (Tex. Crim. App. December 18, 1991) (evidence of, inter alia, alcoholism not Penry-problematic); Gosch v. State, ___ S.W.2d____, No. 69,726 (Tex. Crim. App. December 18, 1991) (extensive evidence of good character prior to disfiguring accident not Penry-problematic); Mooney v. State, 817 S.W.2d 693 (Tex. Crim. App. 1991) (evidence of religious devotion not Penry-problematic); Black v. State, 816 S.W.2d 350 (Tex. Crim. App. 1991) (extensive evidence of good character including decorated military service in Vietnam, not Penry-problematic); Richardson v. State,___S.W.2d___, No. 68,934 (Tex. Crim. App. June 12, 1991) (evidence of "voluntary service, religious devotion, artistic/poetic talent, family ties, and mental\emotional impairment," not Penry-problematic).

"not the kind of uniquely severe permanent handicap" requiring additional jury instructions under Penry).

This confusion is intolerable and unnecessary. The Graham majority's reasoning cannot be reconciled with Penry's declaration that the Texas special issue questions passed Eighth Amendment muster only if they permitted the jury to fully consider all the mitigating evidence that was relevant to the defendant's background, character, and to the circumstances of the offense. Penry, 492 U.S. at 322. Nor does the Graham majority opinion reflect Penry's concern that the jury be permitted a "reasoned moral response" to the defendant's particular mitigating circumstances in imposing sentence. The Graham dissent accurately charcterized the majority opinion as "modify[ing] Penry for a comfortable fit with Jurek," rather than applying the straightforward reasoning of Penry to the facts of Mr. Graham's case. Graham, slip op. (Reavley, J., joined by Politz, King, Davis, and Wiener, JJ., dissenting) at 2028. More important, the preclusive limitations on mitigating evidence imposed by the majority opinion in Graham strike not just at Penry, but at the whole rationale of Lockett and Eddings; the contours of the Eighth Amendment requirement of informed and guided jury discretion, and thus individualized sentencing in capital cases, remain unresolved, despite fourteen years of unbroken precedent from this Court.[23] When an en banc Court of

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[23] See Graham, slip op. at 2031 (Higginbotham, J., dissenting) (noting that enforcing the requirement of

(continued...)

Appeals splits almost evenly on an issue of such moment, this Court should intervene.

CONCLUSION

The decision of the court below offends the Eighth Amendment imperative of individualized sentencing in capital cases by limiting the jury's discretion to consider relevant mitigating evidence. Petitioner Gary Graham thus respectfully prays that this Honorable Court grant the writ to review the judgment of the en banc United States Court of Appeals for the Fifth Circuit in his case, and reverse his sentence of death.

Respectfully submitted,

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[23](...continued)
individualized sentencing in capital cases is a "conceptual puzzle").

APPENDIX A

Gary GRAHAM, Petitioner-Appellant,

v.

James A. COLLINS, Director, Texas Dept. of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 88-2168.

United States Court of Appeals, Fifth Circuit.

Jan. 3, 1992.

State prisoner under death sentence sought habeas corpus. The United States District Court for the Southern District of Texas, David Hittner, J., denied relief. Petition for probable cause was denied by the Court of Appeals, 854 F.2d 715. The United States Supreme Court vacated, 492 U.S. 915, 109 S.Ct. 3237, 106 L.Ed.2d 585. On remand, the Court of Appeals granted habeas corpus, 896 F.2d 893 and rehearing en banc was ordered, 903 F.2d 1014. The Court of Appeals, Garwood, Circuit Judge, held that Texas death penalty statute adequately allowed for consideration of mitigating factors of defendant's youth and of defendant's respect for his family members and support for his children as they were relevant to the special issue of whether defendant would represent a continuing threat to society.

Dismissal of petition affirmed.

Reavley, Circuit Judge, dissented and filed an opinion in which Politz, King, W. Eugene Davis, and Wiener, JJ., joined.

Patrick E. Higginbotham, Circuit Judge, filed a dissenting opinion.

Opinion 896 F.2d 893, superseded.

1. Habeas Corpus ⇐818

Standard for granting certificate of probable cause requires that habeas petitioner make substantial showing of denial of federal right.

2. Criminal Law ⇐1213.8(8)

Imposition of death sentence on 17-year-old convicted of capital murder did not violate Eighth Amendment. U.S.C.A. Const.Amend. 8.

3. Criminal Law ⇐641.13(7)

Trial attorney in state capital murder trial was not ineffective, although defendant contended attorney construe death penalty statute as precluding consideration of mitigating factors; attorney was not in any way discouraged by statute from presenting mitigating evidence of defendant's psychiatric treatment but, rather, his decision not to pursue that course resulted from his belief that little convincing evidence existed and that damaging rebuttal evidence would be introduced. Vernon's Ann.Texas C.C.P. art. 37.071; U.S.C.A. Const.Amend 6.

4. Habeas Corpus ⇐718

Competent evidence supported state court finding that defendant was competent to be executed.

5. Habeas Corpus ⇐773

Habeas petitioner failed to overcome presumption that state trial court's finding that defense counsel was effective was correct. U.S.C.A. Const.Amend. 6.

6. Constitutional Law ⇐270(1)
Criminal Law ⇐1206.1(2), 1213.2(2)
Searches and Seizures ⇐12

Texas death penalty statute provides proportionality and does not violate Fourth, Fifth, Sixth, Eighth or Fourteenth Amendments. U.S.C.A. Const.Amends. 4-6, 8, 14; Vernon's Ann.Texas C.C.P. art. 37.071.

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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

7. Constitutional Law ⇐221(1, 5), 250.-2(1, 4), 265, 267
Grand Jury ⇐2½
Jury ⇐33(2.1)

Exclusion of 18-year-olds and blacks from grand jury and petit juries in state capital murder trial did not violate defendant's due process and equal protection rights; peremptory challenges against blacks resulted from venireman's testimony that they were opposed to death penalty and no case law suggested that the exclusion of 18-year-olds is unconstitutional. U.S.C.A. Const.Amends. 5, 14.

8. Criminal Law ⇐1208.1(5)

Merely because mitigating evidence has some relevance to a negative answer to one of the special issues submitted to the jury at the sentencing phase under Texas death penalty statute does not necessarily suffice to sustain the application of the statute. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

9. Criminal Law ⇐1206.1(2)

Where no major mitigating thrust of evidence presented at sentencing phase is substantially beyond the scope of the three special issues submitted under the Texas death penalty statute, i.e., whether the conduct was deliberate, whether there is a probability that defendant will commit criminal acts in the future, and whether the defendant was acting in response to provocation, the Texas statutory scheme is valid and allows proper consideration of all mitigating evidence presented. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

10. Criminal Law ⇐1206.1(2)

Mitigating factors of relative youth and evidence reflecting good character traits, such as steady employment and helping others, are adequately covered by second special issue of the Texas death penalty statute which asks the jurors to consider whether there is a probability that defendant will commit criminal acts of violence and will constitute a continuing threat to society. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

11. Homicide ⇐357(6)

Evidence of good character or transitory condition, such as youth or being under some particular emotional burden at the time of the homicide, will typically tend to indicate that the crime in question is not truly representative of what the defendant's normal behavior is, or may become over time, and will tend to indicate that defendant may be rehabilitated so as not to be a continuing threat to society and such mitigating evidence is adequately accounted for under the Texas death penalty statute by the requirement that the jurors consider likelihood of defendant's future dangerousness. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

12. Homicide ⇐357(6)

Defendant's youth as a mitigating factor in capital murder prosecution was adequately encompassed by special issue asking the jury whether defendant was likely to be a danger to society in the future, and that special issue adequately allowed jury's consideration of that mitigating factor; whatever is mitigating about youth tends to lend support to a "no" answer to that special issue and its tendency to do so is essentially proportional to the degree to which the jury considers that

such factors as youth were influential in defendant's probable conduct. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

13. Homicide ⇐357(4)

Youth is not a factor mitigating against imposition of the death penalty with respect to a defendant's conduct which is not attributable to youth. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

14. Homicide ⇐357(6)

Mild evidence of normal and good character on defendant's part, such as respect for his grandmother and stepfather and his closeness to his mother, his lack of violence, his willingness to help out around the house, and his contribution to the support of his children was related to special issue under Texas death penalty statute of whether there was a probability that defendant would be a continuing threat to society, and statute requiring the jury to answer that special issue adequately allowed for consideration of that mitigating evidence. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

15. Homicide ⇐357(4)

Evidence that defendant's mother was frequently hospitalized with a nervous condition or mental illness from the time that defendant was approximately three years old was not comparable to evidence of a defendant's own mental illness or retardation which might be a mitigating factor not adequately presented to the jury by Texas death penalty statute. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

16. Homicide ⇐357(4)

Defendant's youth, respect for his family, and support of his children had mitigating relevance to special issues under Texas law of whether the conduct of the defendant was committed deliberately and with reasonable expectation that death would result and whether the conduct of defendant was unreasonable in response to any provocation of the deceased. Vernon's Ann.Texas C.C.P. art. 37.071(b)(1990).

Appeal from the United States District Court for the Southern District of Texas.

On Remand from the Supreme Court of the United States

Before CLARK, Chief Judge, REAVLEY, POLITZ, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, and BARKSDALE, Circuit Judges.*

GARWOOD, Circuit Judge:

A panel of this Court previously affirmed the district court's denial of Gary Graham's habeas corpus petition challenging his Texas capital murder conviction and death sentence. *Graham v. Lynaugh*, 854 F.2d 715 (5th Cir.1988). Thereafter, the United States Supreme Court, in *Graham v. Lynaugh*, 492 U.S. 915, 109 S.Ct. 3237, 106 L.Ed.2d 585 (1989), issued a per curiam order that granted Graham's petition for writ of certiorari, vacated the judgment of this Court, and remanded the case to this Court "for further consideration in light of *Penry v. Lynaugh*," 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Pursuant to that remand order, a panel of this Court reconsidered the case, and, by a divided vote, vacated Graham's death sentence, the panel majority determining that the Texas capital sentencing system was unconstitutionally applied in Graham's case because the jury at the sentencing phase of his trial, having been given no special instructions, was not able to adequately consider and give effect to Graham's youth as a mitigating factor. *Graham v. Collins*, 896 F.2d 893 (5th Cir.1990). Having ordered rehearing en banc, *id.* 903 F.2d 1014 (5th Cir.1990), we have again reconsidered the case in light of *Penry* and, disagreeing with the panel majority's determination in this respect, we now reinstate our former affirmance of the district court's denial of habeas relief.

* Judges Emilio M. Garza and Harold R. DeMoss, Jr. were sworn in after this case was argued to the En Banc Court and elected not to participate in this en banc decision.

Procedural History

Over his plea of not guilty, Graham was convicted by a Texas court jury in October 1981 of the offense of capital murder, the May 1981 intentional killing of Bobby Lambert by shooting him with a pistol while in the course of robbing or attempting to rob him. Texas Penal Code, art. 19.03(a)(2). At the sentencing phase of the trial, the jury answered in the affirmative each of the three special issues provided for in Texas Code of Criminal Procedure, art. 37.071(b), and Graham was accordingly sentenced to death.[1] On direct appeal, Graham's conviction and sentence were affirmed by the Texas Court of Criminal Ap-

1. The 1988 and 1990 panel opinions in this case erroneously indicated that only the first two issues specified in art. 37.071(b) were submitted. *See, id.*, 896 F.2d at 898 n. 4 and 854 F.2d at 718.

Until 1991, sections (a) through (e) of art. 37.071 provided, as they did also in 1981, as follows:

"(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

"(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.

"(d) The court shall charge the jury that:

"(1) it may not answer any issue 'yes' unless it agrees unanimously; and

"(2) it may not answer any issue 'no' unless 10 or more jurors agree.

"(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life."

The above provisions are the same as when the statute was first enacted in 1973 (except that by 1981 amendment the word "three" was inserted in the opening clause of section (b)).

In May 1991 the Texas Legislature passed two bills amending art. 37.071. S.B. 880, ch. 838, 72nd Leg., R.S.1991, extensively amends the Texas capital sentencing procedure, in-

peals in an unpublished opinion. Graham subsequently sought habeas corpus relief in the Texas courts. After holding an evidentiary hearing on Graham's allegations, the convicting trial court recommended denial of relief, transmitting to the Court of Criminal Appeals findings and conclusions rejecting Graham's contentions. The Court of Criminal Appeals thereafter denied relief pursuant to an unpublished opinion.

Graham then brought the present proceedings under 28 U.S.C. § 2254 in the district court. That court denied relief without an evidentiary hearing, and denied stay of execution and a certificate of probable cause. A panel of this Court granted an interim stay, but ultimately denied Graham's application for certificate of probable cause. *Graham*, 854 F.2d 715. Judge Jolly, in his opinion for the panel consisting of himself and Judges Reavley and King, considered and rejected seriatim each of Graham's several claims. In part IIB of the opinion, the panel dealt with Graham's contention that the Texas statutory special issues, which mandate the death penalty if all are answered affirmatively, *see* note 1, *supra*, do not permit the jury to adequately weigh mitigating circumstances when formulating their answers. *Id.* at 718–20. The factors Graham relied on as mitigating were primarily his youth—he was seventeen at the time of the offense—and certain matters reflected by evidence concerning his childhood.[2] *Id.* The panel relied particularly upon *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), and concluded by holding that "the jury's verdict ... is consistent with the constitutional requirements outlined in *Franklin* and other precedents." *Id.* at 719.[3]

[1–7] Following the Supreme Court's remand for reconsideration in light of *Penry*, the panel again grappled with this difficult issue.[4] Judge Reavley, for the panel majority, held that:

> "The mitigating evidence that Graham introduced during sentencing included his youth and his difficult childhood. Graham argues this evidence is relevant beyond the scope of the special questions and that, because no additional instructions were given, the Texas statute was unconstitutionally applied in his case. Because of Graham's age, we agree." *Id.* at 897.[5]

Judge Jolly, in his 1990 dissent, concluded that the second special issue adequately encompassed any mitigating aspects of youth that the jury must constitutionally be free to consider, as Graham's youthfulness was such a factor only to the extent his offense was a product of it, and youth was necessarily a transitory condition that the jury could fully take into account "by giving a negative answer to the future dangerousness inquiry of the second special issue." *Id.* at 899.

Context Facts

At the guilt-innocence phase of the trial, Graham's defense was essentially only one of insufficient identification. The state presented several witnesses to the shooting, which occurred at about 9:30 p.m. on Wednesday, May 13, 1981, in the parking lot of a Safeway Food Store in Houston, Texas. The perpetrator, a man wearing black pants and a white jacket, bumped into Lambert, who was carrying a sack of groceries out of the store, and attempted to grab Lambert's wallet. Some of the testimony indicated that there was a brief struggle between the two. Lambert pushed at the perpetrator, and each stepped back; the perpetrator produced a

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cluding art. 37.071, and specifies an effective date of September 1, 1991, but is expressly made applicable "only" to offenses "committed on or after September 1, 1991." S.B. 880, § 5. The changes made by S.B. 880 § 1 to art. 37.071 include the entire elimination of the former first and third special issues (the former second special issue is retained verbatim in all cases), provision for a new special issue where the jury charge allowed the defendant to be found guilty under the law of parties, and provision in all cases for the following new special issue:

> "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed."

If all issues submitted are answered adversely to the defendant, the sentence is death; otherwise, the sentence is life imprisonment. S.B. 880 was finally passed May 17, 1991, and was filed without the Governor's signature on June 16, 1991. The other bill, H.B. 9, ch. 652, 72nd Leg., R.S.1991, was finally passed May 27, 1991, and was signed by the Governor June 16, 1991. Section 9 of H.B. 9 provides that art. 37.071 "is amended to read as follows" setting it out in full in the *same* form as it existed previously (or before May 1991) with only minor, technical changes (a new section 1 is added providing that the judge shall sentence the defendant to life imprisonment if the state does not seek the death penalty; the remainder of art. 37.071 is put into its section 2, stated to apply only if the state seeks the death penalty; the only other changes are from "upon" to "on" at the beginning of section 2(a) and using the current designation for the former Texas Department of Corrections in section 2(e)). H.B. 9 specifies September 1, 1991 as its effective date (section 16), and its section 15(a) states: "(a) The changes in law made by Section 1–9 and 11, 12, and 13 of this Act apply to the trial of a capital offense that commences on or after the effective date of this Act, whether the trial is for an offense committed before, on, or after the effective date."

We merely note these 1991 enactments, and express no opinion with respect to whether, for offenses committed on or after September 1, 1991, the controlling form of art. 37.071 is as provided in S.B. 880 § 1 or H.B. 9, § 9.

2. The panel also, among other things, rejected Graham's contention that the Eighth Amendment prohibited execution for an offense committed when the defendant was less than eighteen years old. *Id.* 854 F.2d at 717–718.

3. The 1988 panel did, however, observe (*id.* at 720, n. 8):

> "We do not suggest that this area of the law is devoid of wrinkles. The Supreme Court has recently granted certiorari in the case of *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir.1987), *cert. granted*, [487] U.S. [1233], 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). In *Penry*, our court closely scrutinized evidence of Penry's mental retardation and concluded that there was some doubt whether the Texas statute permitted this evidence to be considered in answering the sentencing questions. 832 F.2d at 925."

4. With respect to the other issues in the case, the 1990 panel opinion observed:

> "In remanding this case, the Supreme Court neither expressed nor suggested disagreement with any part of our prior opinion other than that relating to Graham's argument that the Texas statutory sentencing procedure does not allow the jury to consider fully the relevant mitigating circumstances, which is discussed in section IIB of that opinion. Accordingly, with the exception of section IIB, we reinstate our prior opinion." *Id.* 896 F.2d at 894.

We agree, and reinstate this portion of the 1990 panel opinion. For the same reason, we similarly deny relief with respect to Graham's contentions addressed in footnotes 5, 7, and 9 of the 1988 panel opinion. *Id.* 854 F.2d at 718 n. 5, 719 nn. 7 & 9.

5. The 1990 panel majority, though summarizing the evidence presented by Graham respecting his childhood, *id.*, did not address whether that evidence, of itself, would have required some further instruction or jury submission beyond that given. As to the *Penry* issue, the panel only addressed "Graham's age."

pistol, leveled it at Lambert's chest, and shot him in the heart from a distance of about two to three feet. The perpetrator then fled without being apprehended. Lambert staggered back toward the store, fell, and died on the spot. The perpetrator had been observed in the store when Lambert was there, but had left a few minutes before Lambert did. So far as the evidence showed, the perpetrator acted alone. Only one of the witnesses, Mrs. Skillern, was able to identify Graham as the perpetrator.[6] She ultimately so identified Graham in a May 26 photographic display and in a May 27 police station "line-up," as well as in her open court trial testimony. Defense counsel attacked Mrs. Skillern's identification, both by vigorous cross-examination and by emphasizing in argument the failure of the other witnesses, at least one of whom was closer to the events in question, to make an identification.[7] However, no defense evidence was presented. In closing argument defense counsel did not suggest that the evidence failed to show that the offense charged had been committed, but rather that it failed to show that Graham was the one who committed it.

At the sentencing hearing, no evidence was introduced concerning the offense of conviction. The state introduced extensive evidence showing that on five different days during the week following his murder of Lambert, Graham committed robberies at a total of nine separate locations and in each instance Graham leveled either a pistol or a sawed-off shotgun on the victim. The first of these was on May 14, and the last on May 20. These offenses involved some thirteen different victims, including women aged fifty-seven and eighteen and men aged sixty-four, fifty-seven, eighteen, and other ages. With respect to a few of these occasions, the evidence indicated Graham was using marihuana. In addition to money and personal effects, five vehicles were stolen. Two of the victims were pistol whipped, one of them being shot in the neck. These were the only serious physical injuries. Graham glancingly struck another victim, the sixty-four-year-old man, with the vehicle he was stealing, apparently trying to run over him. The fifty-seven-year-old woman was kidnapped and raped, after which Graham fell asleep in her apartment, she contacted the police and he was arrested there, thus bringing his crime spree to an end. On five of these occasions Graham apparently acted alone; on four others an accomplice (not shown to be of a different age from Graham) was present or nearby, but Graham wielded the weapon. At least six of the separate incidents, including that with the sixty-four year old and the two with the fifty-seven year olds, involved Graham practicing initial successful deception on the victim. The state also introduced testimony of a Texas Youth Council employee that she had been familiar since an unspecified time in 1979 with Graham's reputation in the community for being a peaceful and law-abiding citizen, and that it was bad; she gave no elaboration or specifics whatever and did not state how she acquired this information, except that it was not based on her own personal observation. This was the entirety of the state's evidence at the punishment stage.

6. The other witnesses did not testify to anything suggesting that Graham was not (or did not resemble) the perpetrator, but merely stated that they did not get a good enough look at (or sufficiently recall) the perpetrator's face to make an identification.

7. The defense also sought to suppress Mrs. Skillern's testimony on the basis that the photographic display and line-up were unduly suggestive. After an extensive hearing out of the presence of the jury, this motion was overruled.

The only evidence presented by the defense at the sentencing stage consisted of the testimony of Graham's stepfather, Joe Samby, and his grandmother, Erma Chron. Samby testified that he had been married to Graham's mother for about five years, and had known Graham for about five years. He said Graham was fifteen when he (Samby) first met him. Graham lived with his father, and worked with him, but Samby did not know what kind of work Graham did. Graham would come by Samby's house once or twice a week to visit his mother. Graham had "real, real respect for his mother. He cared about his mother. He was real close to his mama." His mother was present in the courtroom, but Samby explained "she can't do nothing because she is on medication and nervous. She is the nervous type." Samby stated that he had never known Graham to be a violent person, that Graham had been "real nice, respectable" with him and, when requested to help out around Samby's house, such as by cutting the grass or to "clean up and help his mother," Graham "would do it and be glad to do it for me." Graham was one of four brothers, and had no sisters. Samby had three children of his own living in his house. Graham had two children, one four and the other two. Graham would "buy ... clothes for his children and try to give them food."[8]

Chron testified that her grandson Graham began staying with her intermittently, beginning "when he was around three," because his mother was frequently hospitalized for a "nervous condition" that Chron said was "mental illness." He would stay with his mother when she was not hospitalized. However, at about age eleven or twelve Graham went to live with his father and "he has been with his father ever since." Graham's mother had been hospitalized "at least twenty times." Chron further stated that while Graham was living with her he attended school, "he would go to church all the time and everything. He loved the Lord," and he didn't give Chron "any problems or trouble." Chron also testified that Graham never had any weapons, and "he has never been violent."

Apart from Samby's testimony that he had known Graham about five years and first knew him when Graham was fifteen, which would indicate that Graham was nineteen or twenty when the offense was committed, there was no evidence before the jury as to Graham's age.[9] Nevertheless, each of Graham's two attorneys, in their closing arguments at the punishment stage, argued to the jury, without prosecution objection, that Graham was seventeen when his offense was committed.

The first defense counsel's argument included the following:

8. There was no evidence as to where Graham's children lived or whether Graham was or had been married.

9. However, it is undisputed that Graham was in fact born on September 5, 1963, this being reflected in a report of a pretrial psychiatric examination filed in the papers of the case in August 1981, the examination having been ordered by the court on motion of defense counsel. Graham was thus seventeen years and eight months of age when the offense was committed. Records of the late May 1981 line-ups at which Graham was identified, which were not before the jury but were put in evidence only in hearings out of the presence of the jury on suppression motions, also reflect that Graham was seventeen at that time.

"We have to make a decision on this young man, Gary Graham. What do we know about Gary Graham? One thing we know about Gary Graham is from May 13 through May 20th he reaped havoc and hell on a lot of people. May 13, 14, 15, 16, 18 and 20th five days. Pure hell. What do we know about Gary Graham? We know that at age 3 he went to live with his Grandmother because his Mother was placed in a mental institution or placed herself in a mental institution. We know he lived on and off with his Grandmother and when she would come out of the hospital he would live with her and when she would go back he would go live with his Grandmother. Draw your own conclusions to that, what type of life he lived. You heard from his Step-father. He stated that Gary Graham would come to his house and visit his Mother every now and then. You heard from his Grandmother, that Gary Graham has 2 children of his own.... Gary Graham is a young man. No doubt about it.... A young man, hasn't even reached 20 years old. Not even 20 years old. He goes on a rage for 7 days, 7 days out of his life. He is not going to ever forget.... I would hope that it was something on the witness stand that you either heard that show some redeeming value. Something in Gary Graham's life to say that possibly he can be rehabilitated. Possibly. And I would urge each and every one of you all that there is a glimmer or a possibility that his life can change, given that opportunity.... Gary Graham, 17 years old, went on a rage for 7 days. What did he do? He harassed people. He stuck guns in their face. He shot an individual and he killed another individual. What was it in response to? Why did he become so aggressive? What makes an individual go on a rage for 7 days? Drugs? Alcohol? Maybe. Life? Maybe...."

Graham's other counsel argued in a similar vein, stating:

"... there are only two answers, and that is a choice. Life or death. Life in the penitentiary at the age of 18 years old. What is the meaning of punishment? Why do we punish.... We are all leaving. Everyone here gets to leave but him. He either goes to live for life in the penitentiary or be prepared for death by injection, and when you look at a young man of his age, what do you think about? What do you think about the years when you think about death. You think about finishing the years of your life back when you are at a point in your life when some people have no direction. Some people have no knowledge of where their [sic] going or what they want to do. Some of us are more fortunate. You also have to look at changes in society. Changes in ages. See, because what you are called upon to do is predict whether some time in the future Gary Graham could become a person fit to return to society. At least he is alive. See, when you are 17 or 20, you are young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. When people come in their middle 20's and middle 30's, a change a little bit from your more radical stands to a more somewhat upright posture because you have had not only time to think, but to see what is in the world. Most of the crime is committed by young people. By the time you get to 25 or 35, it's different. 35 and above.... because there is something about human nature that not only changes you, but slows you down as you live. If you live. If you live...."

The prosecution's argument did not refer to Graham's age in any way except to once acknowledge "his youth." The prosecution stressed Graham's killing of Lambert and his other many serious offenses in the following week, stating in part:

"Gary Graham does have direction, and he has shown you that direction. He has shown you that direction in every way that you can possibly look at.... [T]here are certain individuals in our society that we have got to look at. And we have got to realize that are not fit to live with us. The evidence beyond a reasonable doubt shows that Gary Graham is not fit to live in this society, that he will constitute a continuing threat to society. Compassion? They ask for compassion. We ask you for his life.... Rights of the individuals of this society. The life of Bobby Grant Lambert. They say look at his youth. When does a human life taken the way he took that life of Bobby Grant Lambert cease to have meaning? It ceases to have meaning when the terror and the degradation of a man such as him holds that life in his hand.... Compassion? Care? Have you just looked at him? ... Death is the only protection that you, as the jury, and society can protect from people and especially Gary Graham. The seeds of our past are the harvest of the future and what seeds has Gary Graham planted? And where has he sowed those seeds? In the fertile earth? No. He buried Bobby Grant Lambert in the earth. His seeds are death. Pain. Suffering. Humiliation. Degradation. What do those things bring? But one thing tell you what Gary Graham is. You have seen his actions. You have heard from the mouths of these people. Deliberate conduct...."

Neither side made any objections to the other's argument. The court instructed the jury in accordance with article 37.071, including informing them that the sentence would be either "death or confinement in the penitentiary for life," and that in answering the three special issues they could take into consideration all the evidence submitted both at the guilt-innocence stage and at the punishment stage.[10] The three special issues called for by art. 37.071(b) were submitted, and each was answered in the affirmative. Neither side objected to the charge or the issues submitted or requested any other or further instructions or issues.[11]

10. The jury was also instructed that the state still had the burden of proof, which never shifted to the defendant, and that "each special issue submitted must be proved by the state beyond a reasonable doubt" and none could be answered "yes" unless all jurors were convinced beyond a reasonable doubt that it should be so answered.

11. Prior to trial, the court had denied defense counsel's motion to "hold article 37.071 ... unconstitutional and void." This motion was grounded on the contention that the special issues called for were too "vague and indefinite," and thus "allow total discretion to a jury to make unfavorable findings against a Defendant, and such findings may be based on any prejudice the jury may have, individually or as a whole." The supporting memorandum explained that "Article 37.071 leaves with both the judge and the jury a vas[t] residue of discretion which is precisely what the Supreme Court in *Furman* [*v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] condemned" and argued that "[c]onsequently, the inquiry [of the article 37.071 issues] is fraught with standardless discretion in the hands of the jury."

There was no suggestion in the motion or memorandum that defendant complained of insufficient discretion (or an insufficient ve-

Discussion

In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Supreme Court sustained the Texas capital sentencing procedure of art. 37.071. This case requires us to examine what, if anything, remains of *Jurek* and art. 37.071 after *Penry*. To provide context for this examination, an overview of some of the other leading decisions of the Supreme Court in this area is appropriate.

Context cases

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Court effectively struck down all capital punishment statutes then in place. The crucial votes in *Furman* were those of Justices Stewart and White, who, as Justice Scalia observed in *Walton v. Arizona*, — U.S. —, 110 S.Ct. 3047, 3061, 111 L.Ed.2d 511 (1990) (concurring opinion), "focused on the infrequency and seeming randomness" with which the death sentence was imposed under the then existing discretionary system.[12] Following *Furman* some thirty-five states adopted new capital sentencing statutes that reduced or narrowed the sentencer's discretion in determining whether or not to impose the death penalty. The Supreme Court ruled on five of these statutes on July 2, 1976. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jurek*; *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). *Gregg* sustained the Georgia statute, which directed the sentencer to consider listed and unlisted aggravating and mitigating circumstances, but allowed a death sentence only if at least one listed aggravating circumstance were found. The Court observed that "*Furman* mandates" that the capital sentencer's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *id.* 96 S.Ct. at 2932, and warned against sentencing standards "so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Id.* at 2935 n. 46. *Gregg* goes on to note, however, that "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." *Id.* at 2939. *Proffitt* applied the *Gregg* rationale to uphold the somewhat similar Florida scheme. *Woodson*, however, struck down the North Carolina statute under which the death penalty was made mandatory for

hicle to give effect to it) to determine that the defendant would not receive the death penalty, or that the jury was not given an adequate basis to consider or give effect to its conclusions concerning defendant's age or background. The complaint was indeed the reverse.

12. Justice Stewart, for example, observed that of those convicted of capital crimes "many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed" and that the Constitution could not tolerate systems that "permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 92 S.Ct. at 2762–63. Justice White observed that under the statutes at issue "there is no meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many cases in which it is not." *Id.* at 2764.

first degree murder, in that case murder during the course of robbery. The Court noted that among the "constitutional shortcoming[s]" of this statute was "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant," and that in capital cases the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense." *Id.*, 96 S.Ct. at 2991. *Roberts* applied the same rationale to invalidate the Louisiana statute under which the death penalty was likewise mandatory for first degree murder.

We turn now to *Jurek*, decided the same day. There seven justices voted to uphold the Texas scheme as embodied in art. 37.071, but no opinion attracted more than three votes. The judgment of the Court was announced in Justice Stewart's opinion, which Justices Powell and Stevens joined, and this opinion has generally been understood as expressing the rationale of the Court's action.[13] Justice Stewart's opinion summarizes the facts adduced at trial, including evidence that Jurek "22 years old at the time, had been drinking beer in the afternoon" of the offense, and that he "had always been steadily employed since he had left school and that he contributed to his family's support." *Id.*, 96 S.Ct. at 2954. In describing the Texas sentencing procedure, the opinion states that at the punishment phase the jury is "presented with two (sometimes three) questions, the answers to which determine whether a death sentence will be imposed." *Id.* (footnote omitted). It observes that only the first two issues specified in art. 37.071 were submitted, that both were answered yes, "and the judge, therefore, in accordance with the statute, sentenced the petitioner to death." *Id.* The opinion then quotes verbatim the full text of the three issues specified in art. 37.071, and continues by stating "[i]f the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed." *Id.* at 2955.

In evaluating the constitutionality of the Texas scheme, Justice Stewart notes that under *Woodson* and *Roberts* "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Id.* at 2956. The opinion then observes that "[t]he Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions," and "[t]hus, the constitutionality of the Texas proce-

13. Justice White, in an opinion in which then Chief Justice Burger and then Justice Rehnquist joined, likewise found the Texas statute constitutional. *Id.*, 96 S.Ct. at 2959–60. Justice White's opinion quotes the statutory special issues in full and observes that "[t]he statute does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions." *Id.*, at 2959.

Justice White, joined by then Chief Justice Burger, Justice Blackmun, and then Justice Rehnquist, dissented in *Roberts*, *id.*, 96 S.Ct. at 3008–3020, and also in *Woodson*. Justice Blackmun wrote a separate dissent in *Woodson* and did not join Justice White's dissent there. *Id.*, 96 S.Ct. at 2992–93. In *Jurek* Justice Blackmun separately concurred in the judgment, with only a brief reference to his *Furman* dissent. *Jurek*, 96 S.Ct. at 2960. Justices Brennan and Marshall dissented in *Jurek*, as well as in *Gregg* and *Proffitt*, on the grounds that the death penalty was unconstitutional *per se*. 96 S.Ct. at 2971–2977. They concurred in the result in *Woodson*, *id.*, 96 S.Ct. at 2992, and *Roberts*, *id.*, 96 S.Ct. at 3007, on the same basis.

dures turns on whether the enumerated questions allow consideration of particularized mitigating factors." *Id.* The Court proceeds to answer this inquiry in the affirmative, but only with regard to the second—the future dangerousness—special issue, because "[t]he Texas Court of Criminal Appeals has not yet construed the first and third questions ... thus it is as yet undetermined whether or not the jury's consideration of those questions would properly include consideration of mitigating circumstances. In at least some situations the questions could, however, comprehend such an inquiry." *Id.* at 2956 n. 7. In turning to the second special issue, the opinion notes that "[t]he Texas Court of Criminal Appeals has yet to define precisely the meaning of such terms as 'criminal acts of violence' or 'continuing threat to society.'" *Id.* at 2956. It goes on to state (96 S.Ct. at 2956–57):

> "In the present case, however, it [the Texas Court of Criminal Appeals] indicated that it will interpret this second question so as *to allow a defendant to bring to the jury's attention* whatever mitigating circumstances he may be able to show:
>
> "'*In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider* whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age *of the defendant* and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider *whether the defendant was under an extreme form of mental or emotional pressure*, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.' [*Jurek v. State*] 522 S.W.2d [934], at 939–940 [Tex.Crim.App.1975]." (emphasis added).

After briefly considering one other Texas Court of Criminal Appeals decision,[14] Justice Stewart's opinion states "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.* at 2957. The opinion concludes by observing:

> "*By authorizing the defense to bring before the jury* at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function.... Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution. *Id.* at 2958 (emphasis added).

Two years later, in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court considered an Ohio death sentence imposed for the murder of a pawnshop operator in the course of an armed robbery of his shop while the defendant, an accomplice, waited outside in the getaway vehicle. Under Ohio law, as the Court construed it, the sentencing judge was required to impose the death sentence for the offense unless he found, by a preponderance of the evidence, one of the three statutory mitigating factors, namely (1) that the victim induced or facilitated the offense, or (2) that the defendant committed the offense under "duress, coercion, or strong provocation," or (3) that it was "primarily the product of" the defendant's "psychosis or mental deficiency." *Id.* 98 S.Ct. at 2959, 2966. "No one planned to kill the pawnshop operator in the course of the robbery." *Id.* at 2957. The presentence report reflected that the defendant, a twenty-one-year-old female, had committed "no major offenses" and that in the opinion of a psychologist her "prognosis for rehabilitation ... was favorable." *Id.* at 2959. The sentencing judge found that the offense was not the product of psychosis or mental deficiency, did not address the other two statutory mitigating factors, and sentenced the defendant to death, stating "that he had 'no alternative, whether [he] like[d] the law or not' but to impose the death penalty." *Id.* The plurality opinion by Chief Justice Burger, joined by Justices Stewart, Powell and Stevens, held that "[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is inconsistent with the Eighth and Fourteenth Amendments. ... a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.* at 2967. The scope of the plurality opinion is unclear. It focuses on the fact that under the Ohio statute the defendant's lack of specific intent to kill "is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors" and that "consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." *Id.* at 2966–67. Similarly, the plurality notes that the Ohio statute's "constitutional infirmities can best be understood by comparing it with the statutes upheld in *Gregg*, *Proffitt* and *Jurek*," *id.* at 2965, and "the statute now before us is significantly different" than those statutes. *Id.* at 2966. More broadly, however, the opinion states that:

> "... a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. ... that risk is unacceptable and incompatible with the command of the Eighth and Fourteenth Amendments." *Id.*

If the quoted language concerning "independent" mitigating weight is understood in its most apparent literal sense, the *Lockett* plurality would seem to be wholly inconsistent with *Jurek*, for in *Jurek* it is clear that the Supreme Court understood what the Texas statute so obviously facially provides, namely that although a wide range of evidence concerning the defendant's character and record and the circumstances of the offense is to be considered in determining whether or not to impose the death penalty, the consideration of that evidence is not "independent" of such relevance as the jury may find it has to the special issues. But such a construction of *Lockett* is not only much broader than the facts there, but is also at war with the plurality's statement that the Ohio statute was "significantly different" than the Texas enact-

14. The case considered was *Smith v. State*, 540 S.W.2d 693, 696–97 (Tex.Crim.App.1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977), where the Texas court examined the sufficiency of the evidence to support the jury's affirmative answer to the second special issue. *Jurek*, 96 S.Ct. at 2957.

ment and that the former's deficiencies "can best be understood by comparing it with" the valid Texas statute.

Justice Blackmun concurred specially in *Lockett*, "for a reason more limited than that which the plurality espouses," namely that the Constitution forbids imposition of "the death sentence for a defendant who only aided and abetted a murder, without permitting *any* consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide." *Id.* at 2969 (initial emphasis added). Justice Marshall likewise concurred specially, adhering to his view that the death penalty was always unconstitutional, but also observing that the defendant "was sentenced to death for a killing that she did not actually commit or intend to commit" pursuant to "a statutory scheme that precluded *any effective* consideration of her degree of involvement in the crime, her age, or her prospects for rehabilitation." *Id.* at 2972 (emphasis added). Justice White concurred specially, expressly disagreeing with the plurality opinion, but concluding that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." *Id.* at 2983.[15] Then Justice Rehnquist dissented, and Justice Brennan did not participate.

The next significant decision in this context is *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), where the Court struck down a death sentence imposed on a sixteen year old, whom the sentencing judge found posed a continuing threat of violence to society. There, Justice Powell's plurality opinion focused on the fact that the sentencing judge appeared to have determined that "in following the law" he was not permitted to "consider" the defendant's troubled background, the evidence showing the defendant's neglectful and turbulent family environment, excessive physical punishment by his father, that the defendant was emotionally disturbed and his mental and emotional development were at a level several years below his chronological age, and that the offense was a product of these circumstances. *Id.* 102 S.Ct. at 873 & nn. 1 & 2, 877. The opinion also observed that the Oklahoma Court of Criminal Appeals, in reviewing the sentence, had noted that defendant's contention " 'that the killing was in actuality an inevitable product of the way he was raised,' " but held that " 'the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior.' " *Id.* at 874. The plurality opinion states that under *Lockett* "the sentencer in capital cases must be permitted to consider any relevant mitigating factor," *id.* at 875, and that "the evidence Eddings offered was relevant mitigating evidence." *Id.* at 877. The rule of *Lockett* was violated because the trial judge "found that *as a matter of law* he was unable even to consider the evidence" and the state appellate court "took the same approach," *id.* at 876, so that "it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf." *Id.* at 877.

Justice O'Connor did not join Justice Powell's opinion, but specially concurred, stating that "the reasoning of the plurality opinion in *Lockett* compels a remand so

15. A modified version of this view subsequently gained majority support. *See Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' " *Eddings*, at 879 (quoting *Lockett*). A remand was necessary for this reason because "it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence." *Id.* Then Chief Justice Burger, joined by Justices White, Blackmun and then Justice Rehnquist, dissented.

In the case *sub judice*, not only was no evidence tendered by the defense excluded, but the trial court's instructions expressly authorized consideration of all evidence admitted in answering the special issues, and, unlike *Eddings*, there is nothing to affirmatively indicate that the jury believed they could not consider any of the evidence for that purpose.

The Court applied *Eddings* in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), to reverse a death sentence because at the sentencing hearing the trial judge had excluded as irrelevant the defense's proffered "testimony of two jailers and one 'regular visitor' to the jail to the effect that petitioner had 'made a good adjustment' during his time spent in jail," and the prosecutor had nevertheless argued to the jury "that petitioner would pose disciplinary problems if sentenced to prison and would likely rape other prisoners." *Id.* 106 S.Ct. at 1670. Justice White's opinion for the Court states that under *Eddings* the capital "sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.' " *Skipper* at 1671 (quoting *Eddings*). Justice White went on to hold:

> "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: 'any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.' *Jurek v. Texas*, 428 U.S. 262, 275, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976).... [E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration." *Id.* (footnote omitted).[16]

Justice Powell, with then Chief Justice Burger and then Justice Rehnquist joined, concurred in the result, conceding that reversal was required on due process grounds because the death sentence had been sought on a factual basis the defendant had not been allowed to rebut, but rejecting the notion that *Eddings* and *Lockett* applied. *Id.* at 1673–1675. Justice Powell—author of the *Eddings* plurality—concluded that the States retained authority "to determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance," that these determinations should be respected provided "they do not foreclose consideration of factors that may tend to reduce the defendant's culpability for his crime," *id.* at 1674, and that "States are only bound to consider those factors

16. The opinion concludes that because the excluded evidence was the only evidence from disinterested witnesses tending to contradict the prosecutor's argument, "it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence." *Id.* at 1673.

that are central to the fundamental justice of execution." *Id.* at 1675. Nothing in Justice White's opinion appears inconsistent with these general premises."

In *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), Justice Scalia, for a unanimous Court, reversed a Florida death sentence where the record "could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." *Id.* 107 S.Ct. at 1824. The defendant had requested that there be taken into account "the testimony concerning petitioner's family background and his capacity for rehabilitation," matters which were not included in the statutory mitigating circumstances. *Id.* at 1824.[18] The Court held that "the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid," citing *Skipper* and *Eddings*. *Id.*[19]

The next year the Court revisited the Texas statute in *Franklin*, where it found no constitutional error in the refusal of a requested jury instruction that any of the special issues could be answered negatively "if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty." *Id.* 108 S.Ct. at 2325 & n. 4. The only mitigating evidence was that defendant's prison service for several years both before and after the offense was without any disciplinary incident. *Id.* at 2324. Justice White's plurality opinion, joined by the Chief Justice and Justices Scalia and Kennedy, observed that "the Texas courts have expressed resolute adherence to *Lockett*" in the decade since it was decided, *id.* at 2326, and rejected the contention, based on the "'independent' mitigating weight" language of *Lockett*, that defendant's "prison disciplinary record reflected so positively on his 'character' that the instructions ... should have provided the jury with a 'mechanism through which to impose a life sentence' even if the jury otherwise believed that both Special Issues should have been answered 'yes.'" *Id.* at 2329. Justice White also expressly rejected the claim that the Constitution required that the jury, even if it answered the special issues affirmatively, be "still entitled to cast an 'independent' vote against the death penalty," stating that "this submission is foreclosed by *Jurek*, which held that Texas could constitutionally impose the death penalty if a jury returned 'yes' answers to the two Special Issues" and that "*Jurek* has not been overruled; and we are not inclined to take any such action now." *Id.* at 2330. The plurality opinion asserts that "*Lockett* does not hold that the state has no role in structuring or giving shape to the jury's consideration of ... mitigating factors," *id.*, and that "we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused." *Id.* at 2331. Recognizing that "two lines of cases"—*Eddings* and *Lockett* on the one hand and *Gregg* and *Proffitt* on the other—"are somewhat in 'tension' with each other," Justice White notes that nevertheless "the Texas capital sentencing system has been upheld by this Court ... precisely because of the way in which the Texas scheme accommodates *both* of these concerns." *Id.* He continues by stating:

> "Doubtlessly this is why this Court originally approved Texas' use of Special Issues to guide jury discretion in the sentencing phase, notwithstanding the fact—expressly averted to in the plurality opinion for the Court—that mitigating evidence is employed in the Texas scheme *only* to inform the jury's consideration of the answers to the Special Issue questions." *Id.* (emphasis added).

Justice Stevens, joined by Justices Brennan and Marshall, dissented, concluding the defendant's evidence of freedom from disciplinary violations during several years of imprisonment was relevant as mitigation in respects other than simply as it bore on his future dangerousness. Such evidence indicated "that petitioner's character was not without some redeeming features" and that he "may have virtues that can fairly be balanced against society's interest in killing him in retribution for his violent crimes," *id.* at 2335, and, by suggesting that his commission of the offense was "not in keeping with his ... usual qualities or traits," bore on his "culpability" for the offense as well as on his future dangerousness. *Id.* at 2336. Justice Stevens concluded that absent some special instruction such as the defendant had requested "it is probable that the jury misapprehended the significance it could attach to mitigating evidence that was descriptive of petitioner's character rather than predictive of his future behavior." *Id.* at 2337. This in Justice Stevens' view rendered the sentence invalid under *Lockett* and *Eddings* and related cases.

Justice O'Connor, with whom Justice Blackmun joined, specially concurred. *Id.* at 2332-2335. She considered *Lockett*, *Eddings* and *Hitchcock* as standing for the proposition that "punishment should be directly related to the personal culpability of" the defendant, and she concluded that "a state may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty." *Id.* at 2333. In Justice O'Connor's view, the evidence of defendant's good conduct in prison "had no relevance to any other aspect of petitioner's character" than his future dangerousness. *Id.* Hence, no special instruction was required. Justice O'Connor contrasted "[t]he limited probative value" of that particular mitigating evidence to "[e]vidence of voluntary service, kindness to others, or of religious devotion [which] might demonstrate positive character traits that might mitigate against the death penalty." *Id.* Her opinion also states:

> "If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or *that had*

17. Indeed, Justice White's opinion indicates evidence such as that of good personal hygiene practices while in prison might properly be treated as irrelevant. *Id.* at 1672 n. 2.

18. The Florida statutory mitigating circumstances as set out in the opinion, *id.* at 1823 n. 3, did not include potential for rehabilitation or lack of future dangerousness or any analogous consideration (nor any general or residual mitigation category). Nor did they include matters such as troubled family history or turbulent upbringing (here, evidence that as a child the twenty-year-old defendant had the habit of inhaling gasoline fumes, as an apparent result of which his mind tended to wander, and that he was one of seven children of a poor family whose father died of cancer), although they did include whether the crime was committed while "under the influence of extreme mental or emotional disturbance" and whether defendant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was "substantially impaired." The opinion contains no discussion whatever of the possible relevance of these latter factors to the "family background" claims of petitioner.

19. The opinion observes that no harmless error argument was made.

relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence. If this were such a case, then *we would have to decide whether* the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation." *Id.* (emphasis added).

However, Justice O'Connor did not expressly proffer an answer to that question.

Penry

At long last, we turn to the crucial decision in *Penry*. There the evidence showed that the defendant, 22 years old and on parole from a prior rape conviction at the time of the charged offense, "suffered from organic brain damage and moderate retardation, which resulted in poor impulse control and in inability to learn from experience." *Id.* 109 S.Ct. at 2941. The brain damage was likely present from birth, "but may have been caused by beatings and multiple injuries to the brain at an early age." *Id.* Penry's mother had "frequently beaten him over the head with a belt when he was a child," and he was "routinely locked in his room without access to a toilet for long periods of time." He "was unable to learn in school and never finished the first grade." Until age twelve, Penry "was in and out of a number of state schools and hospitals." *Id.* Thereafter, it took him over a year to learn to print his name. *Id.* at 2942. The two psychiatrists testifying for the State both opined that Penry was sane, but they also acknowledged his "extremely limited mental ability, and that he seemed unable to learn from his mistakes," one indicating that Penry had "an inability to learn from experience and a tendency to be impulsive and to violate society's norms." *Id.* Defense counsel unsuccessfully objected to the sentencing charge on several grounds, including its failure to define "deliberately" as used in the first special issue, its failure to "authorize a discretionary grant of mercy based upon the existence of mitigating circumstances," and its failure to condition a death sentence on a determination "that any aggravating circumstances ... outweigh any mitigating circumstances." *Id.* At sentencing, defense counsel argued, among other things,

> "that if a juror believed that Penry, because of the mitigating evidence of his mental retardation and abused background, did not deserve to be put to death, the juror should vote 'no' on one of the special issues even if it believed the State had proved that the answer should be 'yes.'" *Id.* at 2950.

In response, the prosecutor noted that the defense counsel had not argued the special issues or shown how the state had failed to meet its burden of proof on them.

The Court, in an opinion by Justice O'Connor, joined in this respect by Justices Brennan, Marshall, Blackmun and Stevens, set aside the death sentence, concluding:

> "In light of the prosecutor's argument, and in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.*[20]

20. Justice Scalia, joined by the Chief Justice and Justices White and Kennedy, dissented from this holding. *Id.* at 2963-68.

Justice O'Connor first determined that the rule Penry sought to establish—that where evidence of the defendant's "mental retardation and abused childhood ... is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence"—was not a "'new rule'" for purposes of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), "because it is dictated by *Eddings* and *Lockett*." *Penry* at 2947. The opinion goes on to explain that "*Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.* at 2947. Quoting her concurring opinion in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987), Justice O'Connor states that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse" and that a capital sentence "'should reflect a reasoned moral response to the defendant's background, character, and crime.'" *Penry* at 2947. Penry's contention is again described as being that the Texas statute was applied in a manner "precluding the jury from acting upon the particular mitigating evidence he introduced." *Id.* Yet again, his claim is characterised as follows:

> "Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its "reasoned moral response" to that evidence in determining whether death was the appropriate punishment. We agree. Thus, we reject the State's contrary argument that the jury was able to consider and give effect to all of Penry's mitigating evidence in answering the special issues without any jury instructions on mitigating evidence." *Id.*

The opinion goes on to explain this conclusion. Respecting the first special issue, the opinion, though suggesting some doubt about the matter, assumes, *arguendo*, that "'deliberately'" was understood by the jury in this connection to mean "something more than" simply "'intentionally'" (which had already been established by the guilty verdict). *Id.* at 2948. It concedes that "Penry's mental retardation was relevant ... to whether he was capable of acting 'deliberately.'" *Id.* at 2949. Nevertheless, "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" A "rational juror" could have concluded "in light of Penry's confession" that he "deliberately killed ... to escape detection."[21] However, "that same juror

Justice O'Connor's opinion also held that the Constitution did not prohibit execution of the mentally retarded, although recognizing that that issue was within the first exception to the doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), barring retroactive habeas application of new rules. *Id.* at 2952-2958. All Justices concurred in the *Teague* aspect of this holding; but Justices Brennan, Marshall, Blackmun and Stevens dissented from the substantive holding, *id.* at 2958-2963, while the Chief Justice and Justices White, Scalia and Kennedy agreed with it (although disagreeing with a portion of Justice O'Connor's reasoning in this respect). *Id.* at 2963-64. This aspect of *Penry* is not implicated in our present consideration of the case *sub judice*.

21. The opinion does not detail the content of the confession. However, it is described in the opinion of the Court of Criminal Appeals on direct appeal, *Penry v. State*, 691 S.W.2d 636 (Tex.Crim.App.1985), *cert. denied*, 474

could also have concluded that Penry"—because his "mental retardation" made him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct," and "because of his history of childhood abuse"—"was less morally 'culpable than defendants who have no such excuse,' but who acted 'deliberately' as that term is commonly understood." *Id.* Thus, in the absence of a sufficiently broad definition of deliberately "we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue." *Id.* [21]

As to the second special issue dealing with future dangerousness, Justice O'Connor observes that Penry's mitigation evidence "is relevant *only* as an *aggravating* factor because it suggests a 'yes' answer to the question of future dangerousness." *Id.* at 2949 (initial emphasis added). She continues by stating that the evidence of Penry's "mental retardation and history of abuse," though diminishing his blameworthiness, "indicates that there is a probability that he will be dangerous in the future," and then quotes with approval from Judge Reavley's opinion for this court in that case, including the following:

> "'If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a *major thrust* of Penry's evidence as *mitigating* evidence.' 832 F.2d at 925 (footnote omitted) (emphasis in original)." *Id.* at 2950 (initial emphasis added).

Justice O'Connor then turns briefly to the third special issue, concerning whether the killing "was unreasonable in response to the provocation, if any, by the deceased." Although the opinion recites the evidence supporting the affirmative answer to this issue,[22] it does not expressly say or even suggest that the mitigating evidence had any relevance to the question (nor does it recite that the State asserted any such relevance). *Id.* at 2950.

Justice O'Connor concludes that resentencing is required because "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to" the evidence of Penry's "mental retardation and abused background" in "rendering its sentencing decision." *Id.* at 2952.

[8] *Penry* clearly stands for the proposition that merely because the mitigating evidence has *any* relevance to a negative answer to one of the special issues does not necessarily suffice in all cases to sustain application of the Texas statute. Penry's evidence had *some* such relevance to the first issue. The more difficult question is whether the Texas statute can operate as written in any case where the mitigating evidence, though all clearly relevant to support a negative answer to one or more of the issues, nevertheless also has *any* mitigating relevance *whatever beyond* the scope of the special issues. *Penry* can fairly be read as precluding use of the Texas statutory scheme in any such situation. But, *Penry* can *also* fairly be read as addressing only a situation where some major mitigating thrust of the evidence is substantially beyond the scope of any of the issues. That, indeed, was the case in *Penry*, where as to the third issue the mitigating evidence was all essentially irrelevant, as to the second issue it was *only* affirmatively harmful to the defense, and as to the first issue its favorable relevance was essentially minor but its "major thrust" was beyond the scope of the issue (see notes 21 and 22 *supra*).

[9] We conclude that *Penry* does not invalidate the Texas statutory scheme, and that *Jurek* continues to apply, in instances where no major mitigating thrust of the evidence is substantially beyond the scope of all the special issues. That is particularly appropriate in a case such as this, where there is no "major thrust" of any of the mitigating evidence which is not relevant to support a negative answer to the second special issue, the only special issue which *Jurek* addressed. Any other holding, it seems to us, would effectively render *Jurek*, and the Texas statutory scheme which it sustained, dead letters.

It is a commonly accepted truism that, just as *none* of us is *all* good, so also *none* of us—not even those who will probably commit criminal acts of violence constituting a continuing threat to society—is *all* bad. The number of capital crime defendants who have *nothing* in their background which might tend to reflect a positive character trait—who have *never* performed *any* voluntary service or exhibited *any* kindness to others or supported their family, to mention but three possible examples—must be miniscule at most. And this, of course, has been obvious all along. So too has it always been obvious that many defendants—because of some transitory condition such as relative youth or emotional distress incident to one of life's many crises to which all are subject such as divorce or loss of a loved one or a job—may, when they committed an offense, have been less able than those not so afflicted to control themselves and evaluate their conduct and its consequences. If *Penry* is read broadly, then in none of these cases can the Texas statutory scheme pass muster. Every one of these cases—the case where a month previously the defendant broke up with his girl friend or

U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986), as reflecting that Penry "had been planning for months to rape somebody and that in the three weeks prior to the instant offense appellant had focused on the deceased and [another] as possible victims," *id.* at 653, that on the morning of the offense when he decided to go to the victim's house (where he forced his way in) and rape her "I knew that if I went over to the chick's house and raped her that I would have to kill her because she would tell who I was to the police and I didn't want to go back to the pen," *id.* at 641, 652–53, and that while the victim was lying helpless on the floor following the rape "I came back and sat on her stomach. I told her that I was going to kill her and that I hated to but I thought she would squeal on me." *Id.* at 641.

The opinion of Justice Clinton, concurring in the result on the direct appeal, espouses the view that the failure to define "deliberately" was error (the majority held it was not error), but that the error was harmless "due to the fact that the evidence of 'deliberateness' was uncontested, overwhelming and in large part gleaned from appellant's written admissions." *Id.* at 657.

22. Judge Reavley, writing for the court in our consideration of *Penry*, observed concerning the deliberateness issue:

> "Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that [the first] issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, *a major thrust* of the evidence of his background and child abuse, logically, does not." *Penry v. Lynaugh*, 832 F.2d 915, 925 (5th Cir.1987) (emphasis added), *rev'd, Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

23. "Penry's own confession indicated that he ... killed her after her struggle had ended and she was lying helpless." *Id.* at 2950. *See also* n. 21 *supra* (indicating that killing was to avoid detection and was contemplated for this purpose from the beginning).

lost his job, the case where as a youth the defendant volunteered to mow a neighbor's yard or was in his early twenties when the offense was committed, and all the others—would demand some other system of sentencing trial. The Texas statutory scheme would be essentially meaningless and *Jurek* would have in substance been overruled.

We doubt that the Supreme Court intended this. Not only has the Court not expressly overruled *Jurek*, but to the contrary it has cited *Jurek* with approval numerous times. As an early example, in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the Court noted that *Jurek* upheld the Texas statutory scheme which "mandates a sentence of death" if the three "statutory penalty questions" are answered affirmatively, *id.* 100 S.Ct. at 2524 n. 1, and observed that Texas could properly ensure that its capital case jurors "be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias," while nevertheless recognizing that "jurors under the Texas '... procedure unavoidably exercise a range of judgment and discretion while remaining true to their oaths." *Id.* at 2527. *See also Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). As we have previously noted, *Lockett* states that the deficiencies of the Ohio statute "can best be understood" by comparing it to, *inter alia*, the "significantly different" Texas statute which *Jurek* upheld. *Lockett*, 96 S.Ct. at 2965, 2966. While the *Eddings* plurality does not cite *Jurek*, many decisions of the Court since then have. We have noted the prominence given to *Jurek* in *Skipper*, 106 S.Ct. at 1671. Other post-*Eddings* decisions citing *Jurek* with approval include *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 554–55, 98 L.Ed.2d 568 (1988); *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 2721, 97 L.Ed.2d 56 (1987); *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 1770, 90 L.Ed.2d 137 (1986); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 876, 879, 79 L.Ed.2d 29 (1984) (declining to "effectively overrule *Jurek*"); *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 3453–54, 77 L.Ed.2d 1171 (1983); *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983); and *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2742 n. 13, 77 L.Ed.2d 235 (1983). The *Franklin* plurality relied principally on *Jurek* and observed that the Texas "method for providing for the consideration of mitigating evidence has been cited repeatedly with favor." *Id.* 108 S.Ct. at 2331 (footnote omitted). Neither the *Franklin* concurrence nor *Penry* purports to jettison *Jurek*. Although *Penry* clearly makes an exception to *Jurek*, it gives no express indication that the exception made is conceived of or recognized as being vastly broader than the rule itself, or that *Jurek* and the Texas scheme will thereafter remain valid only in the very rarest of cases.

Since *Penry*, the Court has continued to cite *Jurek* with approval. Thus, the Chief Justice's opinion in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 1081–82, 108 L.Ed.2d 255 (1990), joined in by Justices White, O'Connor, Scalia and Kennedy, describes *Jurek* and the Texas system in a way which obviously would be wholly inappropriate if either were viewed as still valid in no more than a small minority of cases. The same can be said for the opinion of Justice Kennedy, joined in by the Chief Justice and Justices White, O'Connor and Scalia, in *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 1261–62, 108 L.Ed.2d 415 (1990),

the here pertinent language of which is quoted in the margin.[24] Plainly, Justice Kennedy regards *Penry* as the exception to *Jurek*, not *Jurek* the exception to *Penry*.

Moreover, as Justice Kennedy points out in *Saffle* (see note 24, *supra*), a broad reading of *Penry* is inconsistent with *Penry*'s holding that its result was "dictated by" *Lockett* and *Eddings* for purposes of *Teague*.

Similar considerations require rejection of any notion that a broad reading of *Penry* is consistent with *stare decisis* because the Texas courts have not kept the "assurance" of *Jurek*, or the Texas scheme is really different than it appears on its face or had been described by the Texas courts prior to the Supreme Court's decision in *Jurek*. The opinion in *Jurek*—rendered the same day as *Woodson* required "particularized consideration of relevant aspects of the character and record of each convicted defendant"—explicitly recognizes that the Texas jury is only allowed to answer "yes" or "no" to three statutory questions and that if these are answered "yes" the death penalty is automatic. The exact wording of the questions is reflected in the Court's opinion. The Court holds that the issue is whether these specific "enumerated questions allow consideration of particularized mitigating factors." *Id.* at 2956. The Court gives an affirmative answer *not* on the basis of any assumed special instructions or definitions being given to the jury, but rather *entirely* on what *evidence* the Texas courts have said may be brought before and considered by the jury *in answering* the second (future dangerousness) question. Thus, the Court relies on the Texas court opinion which it describes as interpreting "the second question to allow *a defendant to bring to the jury's* attention whatever mitigating circumstances he may be able to show.". *Id.* (emphasis added). The Court next quotes the Texas court's language in which it says "the jury could consider" various items of evidence—including matters such as presence or absence of past criminal conduct, "age of the defendant" and "mental or emotional pressure"—*"[i]n determining the likelihood*

24. Justice Kennedy's opinion states:

> "To the extent that Penry's claim was that the Texas system prevented the jury from giving *any* mitigating effect to the evidence of his mental retardation and abuse in childhood, the decision that the claim did not require the creation of a new rule is not surprising. *Lockett* and *Eddings* command that the State must allow the jury to give effect to mitigating evidence in making the sentencing decision; Penry's contention was that Texas barred the jury from so acting....
> "Penry's claim, moreover, did not ask us to apply the reasoning of *Lockett* and *Eddings* so much as it required us to apply our decision in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). *Penry* interpreted *Jurek* as holding that the Texas death penalty statute is constitutional so long as it is interpreted by the Texas courts to permit the jury to consider mitigating circumstances proffered by the defendant.... Having thus construed *Jurek*, we concluded that resolution of Penry's claim that 'those assurances were not fulfilled *in his particular case*,' 492 U.S., at [318], 109 S.Ct., at 2947 (emphasis in original), did not involve the creation of a new rule.... *Penry*, ... must be understood in terms of the Court's ruling in *Jurek*, and its application in later cases. We did not view *Lockett* and *Eddings* as creating a rule different from that relied upon in *Jurek*; rather, we indicated that *Lockett* and *Eddings* reaffirmed the reasoning in *Jurek*...." *Id.* 110 S.Ct. at 1261–62 (initial emphasis added).

Justice Kennedy goes on to cite *Jurek* as an example of "our long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." *Id.* 110 S.Ct. at 1262.

that the defendant would be a continuing threat to society." *Id.* (emphasis added). The Supreme Court then says "[b]y authorizing *the defense to bring before the jury* ... whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.* at 2958 (emphasis added). This "assurance" has not been broken or even slightly bent, but on the contrary has been fully performed. Texas has continued to interpret its sentencing statute just exactly as the Supreme Court in *Jurek* assumed it would.

[10] The Supreme Court's opinion in *Jurek* reflects that the defendant there was twenty-two years old, had been drinking beer earlier in the day of the offense, and had been steadily employed and contributed to his family's support. *Id.* at 2954. At the very least, *Jurek* must stand for the proposition that these mitigating factors—relative youth and evidence reflecting good character traits such as steady employment and helping others—are adequately covered by the second special issue. *Penry* cannot hold otherwise and at the same time not be a "new rule" for *Teague* purposes. The decisions in *Eddings* and *Lockett* do not justify a contrary conclusion, as *Saffle* says "[w]e did not view *Lockett* and *Eddings* as creating a rule different from that relied upon in *Jurek*; rather" these cases "reaffirmed the reasoning in *Jurek*." *Saffle* at 1262.

[11] We believe that what *Penry* represents is a set of atypical circumstances of a kind that, quite understandably, neither the Texas Court of Criminal Appeals nor the Supreme Court in *Jurek* had in mind, namely circumstances where the defense's mitigating evidence would have either no substantial relevance or only adverse relevance to the second special issue. Typically, evidence of good character, or of transitory conditions such as youth or being under some particular emotional burden at the time, will tend to indicate that the crime in question is not truly representative of what the defendant's normal behavior is or may become over time, and that the defendant may be rehabilitable so as not to be a continuing threat to society. The core of *Jurek*—which we cannot conclude has been abandoned—is that the mitigating force of this kind of evidence is adequately accounted for by the second special issue. But in *Penry* the Court was faced for the first time with a wholly different type of mitigating evidence. Not evidence of good character, but of bad character; not evidence of potential for rehabilitation, but of its absence; not evidence of a transitory condition, but of a permanent one; but *nonetheless* evidence which was strongly mitigating because these characteristics were due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own, mental retardation, organic brain damage and an abused childhood. There was no way this type of evidence could be given any mitigating force under the second special issue. To recognize that, as *Penry* did, is not necessarily to deny the validity of *Jurek* as it applies to the more typical case.

We conclude that the core of *Jurek* remains intact, and we now apply it to the circumstances *sub judice*.

Youth

[12] The primary mitigating factor which Graham urges was not adequately encompassed in the special issues is his youth. We disagree.

For at least five years before Graham's trial, it was established Texas law that the jury, in answering the second special issue, could consider "the age of the defendant." *Jurek v. State*, 522 S.W.2d 934, 940 (Tex.Crim.App.1975), *aff'd sub nom. Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). Since then, the Texas decisions have consistently followed this rule. For example, in *Roney v. State*, 632 S.W.2d 598 (Tex.Crim.App.1982), the Court of Criminal Appeals, noting that the defendant was seventeen and that "the age of the defendant" was "relevant in deciding the second punishment issue," *id.* at 601, held that considering the entire record, including the defendant's "young age," the evidence was insufficient to support the jury's affirmative answer to the second issue. *Id.* at 603. *See also, e.g., Robinson v. State*, 548 S.W.2d 63, 64 (Tex.Crim.App. 1977); *Earvin v. State*, 582 S.W.2d 794, 798–99 (Tex.Crim.App.1979); *Brasfield v. State*, 600 S.W.2d 288, 293 n. 3 (Tex.Crim. App.1980); *Keeton v. State*, 724 S.W.2d 58, 61 (Tex.Crim.App.1987).

The Supreme Court's opinion in *Jurek* affirmatively reflects that the defendant was "22 years old at the time" of the offense, *id.* at 2954, and, in upholding the death sentence and the Texas scheme, quotes the portion of the Court of Criminal Appeals' opinion stating that in answering the second issue the jury can consider "'the age of the defendant.'" *Id.* at 2957. *Jurek* thus squarely answers the question of whether "youth" is adequately taken into account by the second special issue. If *Penry* compels a different result, it would have been a new rule for purposes of *Teague*, as *Saffle* makes clear. Indeed, if *Jurek* may not apply to the very type of case that was then before the Court, it has been overruled. But, as noted, the Supreme Court has not so treated it. Moreover, *Penry* itself involved a twenty-two-year-old defendant, *id.* at 2941, and the opinion contains no suggestion whatever that this fact was one which could not be adequately taken into account in answering the statutory special issues.[25]

25. Nor can we accept the notion that twenty-two is not youthful for purposes of any constitutionally mandated rule that the capital sentencer must be able to take into account the defendant's "youth" at the time of the offense. Texas clearly regards those in their early twenties as youthful for this purpose. *See, e.g., Lackey v. State*, — S.W.2d —, — (Tex.Crim.App.1991) (describing as a mitigating circumstance "youthful age (23) at the time of the offense"); *Trevino v. State*, 815 S.W.2d 592, 622 (Tex.Crim.App.1991) ("There is also mitigating evidence of appellant's youth; appellant was twenty-one years old at the time of the offense"); *Madden v. State*, 799 S.W.2d 683, 684 (Tex.Crim.App. 1990) ("Appellant, however, introduced substantial mitigating evidence. He was only twenty-one years old at the time of this offense"). The salient factors which make "youth" mitigating—principally inexperience with resultant diminished judgment and self-control—are all generally present among those in their early twenties, albeit to a lesser degree than in those still younger. And this, indeed, is the approach taken by Graham's counsel, as reflected in his statements in closing argument (see note 28 *infra; see also* text at note 9 call *supra*). We do not believe that for this purpose a categorical distinction is proper based on some specific age, such as eighteen, which is often the age of majority (in Texas minors are those under eighteen who have never been married; Tex. Probate Code § 3(t)) or the minimum age for purposes of engaging in certain conduct (cf. U.S. Const.Am. XXVI). The Supreme Court rejected such an approach in holding that the Constitution does not forbid the death sentence for offenses committed at age sixteen or seventeen. *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

Since *Penry*, the Texas Court of Criminal Appeals has continued to hold that the second special issue provides an adequate vehicle for the jury to take into account the defendant's youth. *See Ex parte McGee*, 817 S.W.2d 77, 80 (Tex.Crim.App.1991); *Lackey v. State*, — S.W.2d — (Tex.Crim.App.1991); *Trevino v. State*, 815 S.W.2d 592, 622 (Tex.Crim.App.1991). We, too, appear to have recognized this. *See DeLuna v. Lynaugh*, 890 F.2d 720, 722 (5th Cir.1989) (evidence that defendant was twenty-one when offense committed would not bring him within *Penry*).

As the panel majority and dissent each correctly recognized, youth is mitigating because insufficient experience has not allowed judgment and self-control to fully develop, but the limitations attributable to youth are all necessarily transitory. *Graham*, at 898, 899. Therefore, whatever is mitigating about youth tends to lend support to a "no" answer to the second special issue, and its tendency to do so is essentially proportional to the degree to which the jury concludes such factors were influential in the defendant's criminal conduct. The greater the role such attributes of youth are found to have played in the defendant's criminal conduct, the stronger the inference that, as his youth passes, he will no longer be a danger to society. Thus, the second special issue affords an adequate vehicle by which the jury can give effect to the mitigating aspect of youth.

[13] We reject the contention that the second special issue is inadequate for this purpose because the jury may believe that youth mitigated the defendant's culpability though not his future dangerousness. But youth is not mitigating with respect to conduct not attributable to it. Thus, *Penry* says that evidence of a defendant's background and character is relevant because "'defendants who commit criminal acts that are *attributable to* a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Id.* at 2947 (quoting Justice O'Connor's concurrence in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)) (emphasis added). *See also Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 1199, 108 L.Ed.2d 316 (1990) (same).[26] To the extent that Graham's criminal conduct was a product of his youth he was for that reason not only less culpable but, to the same extent, also less likely to be dangerous when no longer young. To the extent Graham's criminal conduct was not attributable to his youth, his youth neither reduced his culpability nor his future dangerousness. Nothing in the present record suggests that the jury here might have

Moreover, such an approach would be at war with the concept of individualized capital sentencing which underlies *Penry*. It is common knowledge that individuals develop and mature at different rates, and it will frequently be the case, for example, that one eighteen and, say, two months, is actually less "mature" and more "youthful" than another who is seventeen and eight months a seventeen year old simply because the offender was seventeen, and regardless of whether the offense was to any extent attributable to his youth. However, such a conclusion is not based on individualized consideration of the offender but merely on a characteristic which is *precisely* the same for him as for every other human being who attains that age, and as such amounts to no more than disagreement with the Texas law which allows execution of seventeen year olds for capital murder.

26. It is true that a hypothetical juror might conclude that death is always an inappropriate penalty for capital murder committed by

viewed the matter in any other light.[27]

Finally, the evidence here, and the manner in which the case was approached and tried in this respect, do not suggest any special factor or circumstance militating against application of what we conceive to be the appropriate general rule, namely that the mitigating force of the defendant's youth at the time of the offense may be adequately taken into account in answering the second special issue. In marked contrast to *Penry*, there is here nothing to suggest that defense counsel desired to have the mitigating force of youth presented or considered in any other manner than as a basis for a negative answer to the second special issue.[28] *Cf. Lowenfield*, 108 S.Ct. at 552 (even where absence of objec-

27. Moreover, to say that the second special issue is for this reason inadequate to take youth into account, is necessarily to also say that it is inadequate to take into account any other mitigating factor which is not wholly coterminous and synonymous with future dangerousness. Yet, as previously indicated, that would be contrary to the core holding of *Jurek*, and would in effect render *Jurek* and the Texas statute it upheld a dead letter. We do not read *Penry* as going that far.

28. Counsel in essence argued that Graham's youth explained his May 13 to 20 crime spree and that he would grow out of it: "A young man, hasn't even reached 20 years old. He goes on a rage for 7 days, 7 days out of his life. He is not going to ever forget.... Gary Graham, 17 years old, went on a rage for 7 days," and:

> "... what you are called upon to do is predict whether some time in the future Gary Graham could become a person fit to return to society. At least he is alive. See, when you are 17 or 20, you are young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. When people come in their middle 20's and middle 30's, a change a little bit from your more radical stands to a more somewhat upright posture because you have had not only time to think, but to see what is in the world. Most of the crime is committed by young people. By the time you get to 25 or 35, it's different. 35 and above.... because there is something about human nature that not only changes you, but slows you down as you live. If you live. If you live...."

The only dissatisfaction counsel expressed with the charge or special issues was by pretrial motion asserting that the special issues left too much standardless discretion to the jury. See note 11, *supra*.

Nothing in the evidence indicates any basis for believing that the offense charged was any more (or less) a product of Graham's youth than any of his other criminal conduct shown by the evidence, and neither side ever suggested otherwise either at trial or in this court.

We reject Graham's contention in this court that his case is like *Penry* because here the prosecutor's argument (especially in respect to "direction" and "seeds of our past") amounted to an implied assertion that Graham's *youth* itself favored an affirmative answer to the second special issue. We disagree. The clearly most reasonable understanding of this unobjected to argument is that it is no more than the mere assertion that Graham's criminal conduct was the most reliable predictor of the direction his future would take. There is absolutely nothing in the argument which implies that this is any *more* likely so because the events of May 13–20, 1981 occurred while Graham was seventeen as opposed to, say, thirty-five (nor even that this was *as* likely so as it would have been if Graham had been thirty-five in May 1981). The prosecutor was not required to concede that just because of Graham's youth he would not in the future be a danger to society. And, there is nothing inconsistent in the assertions that, on the one hand, some youthful criminals may pose a danger to society even after they mature, and, on the other hand, that criminal acts by youths are *less* likely to be predictive of future such behavior on their part as a mature adult than are similar acts by those who are already mature adults. Moreover, we are aware of nothing to suggest that Texas has ever treated youth in this connection as anything other than a factor tending to favor (albeit not necessarily to require) a "no" answer to the second special issue.

tion is not a waiver it may reflect posture and understanding of trial participants).

We reject Graham's contention that, in light of *Penry*, the mitigating force of his youth could not adequately be given effect in answering the special issues.

Other circumstances

[14] Although the mitigating factor primarily at issue is youth, Graham also contends that under *Penry* the testimony of his stepfather, Samby, and his grandmother, Chron, constituted mitigating evidence which could not adequately be given effect in answering the special issues. We disagree.

With one exception to be noted, the testimony of Samby and Chron simply constituted rather mild evidence of normal, good—though not exceptionally good—character on Graham's part: he had respect for and was nice to his mother and stepfather, cared about and was close to his mother, gave his grandmother no problems or trouble, was never violent, never had weapons, would willingly help out around the house, went to school and to church, "loved the Lord," worked and contributed to the support of his two children.

It appears to us that the principal mitigating thrust of all this evidence is to suggest that the events of May 13–20 were aberrational and atypical of Graham's true character and that he thus had potential for rehabilitation, and would not be a continuing threat to society. As such, the mitigating force of this evidence can adequately be given effect under the second special issue.

This evidence does not seem different in kind from that before the Supreme Court in *Jurek*, where the defendant's father testified that "the petitioner had always been steadily employed since he had left school and that he contributed to his family's support." *Id.* at 2954. Nor does this sort of character evidence seem other than wholly typical of what might be expected in a vast number of cases. As noted, were evidence of this kind held to invoke *Penry*, then *Jurek* and the Texas statutory scheme would for all practical purposes be wholly eviscerated.[29] Further, this sort of evidence is different in kind from that involved in *Penry*, as its relevance to each of the special issues, and particularly the second, is entirely in the direction of a negative answer, and it has no tendency to reduce culpability for the particular crime charged in any way not encompassed within one or more of the special issues. Unlike *Penry* type disability evidence, which can reduce culpability where it is inferred that the crime is attributable to the disability while other similar offenders have no such "excuse," good character evidence provides no variety of "excuse." Further, absent some unusual indication of an essentially *permanent* adverse *change* in character (e.g., brain damage), to the extent that the testimony is convincing that the defendant's general character is indeed good it will also, to essentially the same extent, be convincing that he will not continue to be a threat to society.

29. We observe that since *Penry*, the Texas courts have held that this kind of evidence is not *Penry* evidence and does not mandate departure from the *Jurek* format. *See, e.g., Ex parte Baldree*, 810 S.W.2d 213, 216–17 (Tex.Crim.App.1991) (evidence that defendant "has been caring, kind, and nonviolent to others . . . is . . . reflective of his character and bears upon his propensity, or lack thereof, for committing future violent acts" and thus is adequately covered by the second special issue without further jury instructions); *Richardson v. State*, 1991 WL 99949, — S.W.2d — (Tex.Crim.App. June 12, 1991, No. 68934) ("evidence of appellant's religious devotion is *Franklin* evidence and could be properly addressed by a jury answering issue number two"); *Mooney v. State*, 817 S.W.2d 693 (Tex.Crim.App.1991) (same). *See also Trevino v. State*, 815 S.W.2d 592, 622 (Tex.Crim.App.1991). In *Boyd v. State*, 811 S.W.2d 105, 111–112 (Tex. Crim.App.1991), the court considered evidence that appellant "was a good worker and was promoted," "was always polite, nice and helpful," "always behaved in a respectful manner," and helped his sister "with her asthma" and his mother "when she hurt her ankle." *Id.* at 111. In rejecting a *Penry* claim, the court said that this evidence "was given full effect within the second special issue" and "[t]o hold otherwise would be tantamount to declaring the capital sentencing scheme facially unconstitutional." *Id.* at 112 (footnote omitted).

[15] There remains only to consider the brief portion of the testimony of Chron that Graham's mother was frequently hospitalized, commencing when he was approximately three, with what Chron characterized without elaboration as a "nervous condition" or "mental illness." In an appropriate context, evidence of this general kind might well form part of a proper *Penry* presentation. We conclude that it does not do so in this case, however. There was no evidence of *any* effect this had on Graham, or of any reaction on his part to it, and no attempt was made to even explore that subject. Further, the entire context in which this testimony was presented, from the point of view both of Chron's testimony as a whole and of all the defense evidence at the sentencing hearing, suggests that there was no adverse effect on Graham. There was no suggestion that he was unhappy, withdrawn, moody, difficult to control or the like, or that he had any mental or psychological problems. The entire thrust of the defense evidence, both from Samby and Chron, was the exact opposite, namely that Graham was a good, stable, nonviolent, ordinary youth. There is no substantial evidence that Graham's criminal conduct was "attributable to a disadvantaged background, or to emotional and mental problems," as Justice O'Connor used those terms in *Penry*. *Id.* at 2947. *See also Boyde*, 110 S.Ct. at 1199. In this respect, the evidence as a whole is simply not comparable to that in *Penry* or *Eddings*.

[16] In sum, not only Graham's youth but also his other mitigating evidence could adequately be taken into account in answering the special issues, particularly the second.[30]

Conclusion

As directed by the Supreme Court, we have further considered our previous affirmance of the district court's denial of habeas relief in light of *Penry*. We conclude that our prior disposition is consistent with *Penry*, and remain convinced that it was proper. Accordingly, we reinstate our

30. We have focused throughout on the second special issue because it is with respect to it that Graham's evidence had the most apparent and strongest mitigating relevance, and because that is the issue addressed in *Jurek*. We do not imply, however, that Graham's evidence lacked mitigating relevance to the first (or even to the third) special issue; it does have such relevance, and that relevance strengthens our conclusion that the special issues were adequate in this case; but whether such relevance to issues other than the second would alone suffice to take this case out of *Penry*'s scope is another matter.

prior mandate affirming the district court's dismissal of Graham's habeas petition.

AFFIRMED.

REAVLEY, Circuit Judge, with whom POLITZ, KING, DAVIS, and WIENER, Circuit Judges, join, dissenting:

The Supreme Court directed this court to reconsider Graham's petition in the light of *Penry*, not to modify *Penry* or to shape *Penry* for a comfortable fit with *Jurek*. In *Penry* Justice O'Connor wrote for the Court that the jury must be able to fully consider and give effect to all "evidence that mitigates against the death penalty" and is relevant to a defendant's background, character, or the circumstances of the crime. 109 S.Ct. at 2947, 2951. If youth is an important mitigating factor—and the Court has said that it is [1]—then *Penry* requires that the sentencing jury be allowed to decide that the death penalty is an inappropriate penalty for Gary Graham. That decision could not have been given effect in his case, and the writ should be granted.

The panel majority stated the *Penry* rule as follows: "a jury sentencing a capital defendant who provides evidence about his character, his background, or the circumstances of the offense that is relevant to personal culpability beyond the scope of the statutory questions must receive instructions that allow the jury to give effect to such evidence." 896 F.2d at 896. The en banc majority, after 21 months, produces an exclusion to the *Penry* rule and holds that no instruction or jury decision is needed for transitory circumstances of mitigation. This court says that any circumstance relevant to whether the defendant is rehabilitable may be adequately treated by the answer to the second issue. Contrary to what the Supreme Court wrote, the Fifth Circuit explains *Penry* as an atypical case where the mitigating evidence either had no substantial relevance, or no adverse relevance, to the second special issue of future dangerousness. I believe my colleagues have gone beyond and contrary to the directions of the Supreme Court and have usurped the role of our superiors.

Graham was 17 years old, legally a minor, when he committed the crime. It is beyond dispute that this fact was a mitigating circumstance, material to the "moral culpability" of the defendant. The jury's sentencing role is to consider such factors and determine whether the defendant is indeed personally and morally culpable. But "culpability" at the punishment phase is not simply a question of guilt or "blameworthiness," but rather a question of "deathworthiness." *See Lackey v. State*, — S.W.2d —, — (Tex.Crim.App.1991) (en banc). To say that evidence mitigates a defendant's culpability is not to say that he is any less guilty or deserving of blame, but that he is less deserving of death. *See Penry*, 109 S.Ct. at 2950 (a juror could believe that "Penry lacked the moral culpability to be sentenced to death").

The special issues of the Texas statute demonstrate how evidence can be relevant to a defendant's culpability. The guilty defendant may be less deserving of death because the evidence shows that he did not act deliberately, or that he does not pose a continuing threat to society, or that his conduct was not unreasonable in response to provocation by the deceased. Indeed, much evidence is mitigating only because it is relevant to one or more of these issues. *See Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 2333, 101 L.Ed.2d 155 (1988) (O'Connor, J., concurring) (evidence of the defendant's good conduct in prison had no relevance to his character outside of the special issues). But the message of *Penry* is that some evidence may make the defendant less deserving of death for reasons "beyond the scope of the special issues." *Penry*, 109 S.Ct. at 2948. The evidence of Penry's mental retardation and history of abuse may not have made his crime less deliberate or his continuing threat to society less probable, but it may nevertheless have made him less deserving of death because it may have made him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Id.* at 2949. Presented with the special verdict questions, and "in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 2950.

This case presents the same dilemma. The jury found that Graham's youth did not make his crime less deliberate or his future threat to society less probable. But a reasonable juror could also have determined, if given the opportunity, that Graham did not deserve a death sentence because, at the age of 17, he was less able to control his impulses or evaluate the consequences of his conduct, or because of other relevant reasons. The majority seems to overlook the fact that "there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant." *Id.* at 2951. In this case, as in *Penry*, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of [Graham's youth] by declining to impose the death penalty, ... the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 2952. Under *Penry*, the jury should have been allowed to weigh that factor in deciding whether Graham deserved to be sentenced to death.

The majority of this en banc court insist upon crafting their own exclusion and following *Penry* only where there is a "major mitigating thrust of the evidence ... substantially beyond the scope of all the special issues." They even declare that youth is mitigating only with respect to conduct attributable to age, and that the mitigating factor of youth at the time of the offense may be adequately taken into account by a Texas jury in answering the issue of future dangerousness. But the Supreme Court requires the sentencer, before assessing the death penalty, to consider all mitigating evidence, not only mitigating factors that contributed to particular criminal conduct. And the Court does not weigh the "thrust" of the mitigating evidence as between special issues and the decision to sentence to death.

Youth, like mental retardation or crippling circumstances in the defendant's background, may be related to deliberateness or to future dangerousness, but those facts of a defendant's life may also affect an entirely different "thrust" and decision. They may reach the much broader ultimate question: Is death the appropriate re-

1. See panel opinion 896 F.2d at 897–98. In *Eddings v. Oklahoma* the Supreme Court said: "All this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must background and emotional development be duly considered in sentencing." 102 S.Ct. at 877.

sponse to this human being, considering his moral culpability as a person? Graham's jury was not told that it could consider evidence in this light or that it could give mitigating effect to it in imposing sentence.

The majority opinion is heavy with scholarship and fine legal argument. It undoubtedly alleviates problems in reviewing the cases of Texas prisoners on death row. I fully appreciate the problems. The Texas Court of Criminal Appeals is struggling with them too. *See Black v. State*, 816 S.W.2d 350 (Tex.Crim.App.1991); *Ex parte Harvey Earvin*, 816 S.W.2d 379 (Tex.Crim. App.1991); *Lackey v. State*, — S.W.2d — (Tex.Crim.App.1991). This does not justify the failure to follow the dictate of the Supreme Court. I would follow that dictate unless the Court, which alone has the authority, chooses to modify our instructions.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting:

The ultimate question in this case is whether the mitigating value of Graham's youth and family circumstances—age seventeen at the time of the offense—is fully expressed by the jury in its answer to two questions: did Graham act deliberately and does Graham present a future danger. The majority opinion, after first concluding that any deficiency in the two questions must be substantial, holds that the answer is yes. I am unpersuaded that the jury's assessment of Graham's moral culpability is fully, or substantially as the majority has it, exhausted by concluding that he acted deliberately and presents a future danger. A jury's reasoned response could be that although Graham acted deliberately, and is likely to do so again, when Graham's tender years and family circumstances are entered in the account of moral culpability, a death sentence is not warranted.

It was true before *Penry* that "[t]he state may not by statute preclude the sentencer from considering *any* ... relevant mitigating evidence."[1] That did not necessarily mean, however, that the state could not limit the effects of mitigation. There was a powerful argument that, given *Jurek*, the Eighth Amendment allowed the state to limit the effects a sentencer might give to mitigating evidence. Justice Scalia made the argument in *Penry*, but his was the dissenting view.

I intend no criticism of the majority's able struggle, but I am not persuaded that we have the freedom to define again the jury's sentencing role in Texas. I say "again" because two decisions of the Supreme Court control this case. The first is that the state, without fettering effect, must give the jury the means for expressing its reasoned moral response.[2] The second decides that Graham's youth and family circumstances are relevant to the core decision for the jury—his moral culpability.[3]

The state may insist upon the jury's "reasoned" moral decision, but the contribution of Graham's youth to his moral culpability, beyond the issues of deliberateness and future dangerousness, has no intrinsic measure or objective weight. There

1. *Eddings v. Oklahoma*, 455 U.S. 104, 113–115, 102 S.Ct. 869, 876–877, 71 L.Ed.2d 1 (1982).
2. *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).
3. *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 2978, 106 L.Ed.2d 306 (1989); *see also Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 2698, 101 L.Ed.2d 702 (1988).

is a point at which we must accept that the moral culpability of a particular person for a particular crime is what the jury says that it is. With all deference, this quintessential blackbox decision yields to no logical or explainable divisor. It is not a "legal" question at all, but is rather like asking judges not to reason but to look to the sky, presumably, and react. Such discrete Rorschach-like inquiries do not produce normative rules. That we are asked to perform such tasks is a powerful signal that something is wrong. The wrong is not difficult to locate. As Justice Harlan put it in *McGautha*:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty and to express these characteristics in language which can fairly be understood and applied by the sentencing authority, *appear to be tasks which are beyond present human ability* (emphasis supplied).[4]

Furman repudiated *McGautha*, but Justice Harlan's wisdom is validated with each encounter of dead ends in the resulting conceptual puzzle. And a puzzle it is.

For example, the Supreme Court in *Cabana v. Bullock*[5] upheld the death sentence while observing that "the jury may well have sentenced Bullock to death despite concluding that he had neither killed nor intended to kill."[6] This despite the fact that in *Enmund v. Florida*[7] the court held that the Eighth Amendment forbids the death penalty for "one ... who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing takes place, or that lethal force will be employed."[8] I would have supposed that whether an accused intended to kill lies at the heart of moral culpability; that the finding of intent to kill would be left with the sentencer. Stated another way, if a state's procedures must allow a defendant's mitigating evidence to find expression in its verdict it is puzzling to allow a state appellate court to supply the critical finding of intent to kill, a finding missing from the jury's verdict. It is a long road from *McGautha* to *Penry*, but the resulting jurisprudence is perverse in that it insists on a reasoned moral response of the jury, an assignment we jurists have failed.

The solution must be left to the Supreme Court, at least in cases as this one where we are left no meaningful latitude. In any event, this case is already so postmarked by the predictable scattering of judges required to react, not reason.

4. *McGautha v. California*, 402 U.S. 183, 204, 91 S.Ct. 1454, 1466, 28 L.Ed.2d 711 (1971).
5. 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).
6. 474 U.S. at 384, 106 S.Ct. at 696.
7. 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).
8. 458 U.S. at 797, 102 S.Ct. at 3376.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JAN 3 1992
GILBERT E. GANUCHEAU
CLERK

No. 88-2168

D.C. Docket No. CR-H-88-563

GARY GRAHAM,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Dept. of Criminal Justice,
Institutional Div.,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Texas
On Remand from the Supreme Court of the United States

Before CLARK, Chief Judge, REAVLEY, POLITZ, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, and BARKSDALE, Circuit Judges.*

J U D G M E N T

This cause came on to be heard on rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause is affirmed by the Court en banc.

January 3, 1992

ISSUED AS MANDATE:

REAVLEY, Circuit Judge, with whom POLITZ, KING, DAVIS and WIENER, Circuit Judges, join dissenting.

HIGGINBOTHAM, Circuit Judge , dissenting.

* Judges Emilio M. Garza and Harold R. DeMoss, Jr. were sworn in after this case was argued to the En Banc Court and elected not to participate in this en banc decision.

APPENDIX C

Gary GRAHAM, Petitioner-Appellant,

v.

James A. COLLINS, Director, Texas Dept. of Crim. Justice, Institutional Div., Respondent-Appellee.

No. 88-2168.

United States Court of Appeals, Fifth Circuit.

June 4, 1990.

Appeal from the United States District Court for the Southern District of Texas; David Hittner, District Judge Presiding.

ON SUGGESTION FOR REHEARING EN BANC

(Opinion March 7, 1990, 5 Cir., 1990, 896 F.2d 893)

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this case shall be reheard by the Court en banc with oral argument. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX D

Gary GRAHAM, Petitioner-Appellant,

v.

James A. COLLINS, Director Texas Dept. of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 88-2168.

United States Court of Appeals, Fifth Circuit.

March 7, 1990.

Petitioner under sentence of death for capital murder conviction sought habeas relief. The United States District Court for the Southern District of Texas, David Hittner, J., denied petition, and petitioner sought certificate of probable cause, seeking stay of execution and habeas relief. The Court of Appeals, 854 F.2d 715, denied petition, and petitioner applied for certiorari. The Supreme Court, 109 S.Ct. 3237 (memorandum decision), vacated and remanded. The Court of Appeals, Reavley, Circuit Judge, held that Texas capital sentencing system did not enable jury to consider and give effect to youth as mitigating factor without special instructions.

Judgment reversed, death sentence vacated, and matter remanded.

E. Grady Jolly, Circuit Judge, filed dissenting opinion.

1. Criminal Law ⇐1208.1(5)

General contours of constitutional limits for capital punishment permit imposing sentence of death only when crime involves statutorily enumerated aggravating circumstances and after jury has been able to consider and to give effect to any mitigating circumstances. U.S.C.A. Const.Amend. 8.

2. Criminal Law ⇐796

Jury sentencing capital defendant who provides evidence about his character, his background, or circumstances of offense that is relevant to personal culpability beyond scope of statutory questions asked under Texas capital sentencing system must receive instructions that allow it to give effect to such evidence. U.S.C.A. Const.Amend. 8.

3. Criminal Law ⇐824(4)

Request for additional instruction at trial was not element of claim that jury was unable to consider and give effect to youth as mitigating factor without special instructions under Texas capital sentencing system. Vernon's Ann.Texas C.C.P. art. 37.071(b-e); U.S.C.A. Const.Amend. 8.

4. Criminal Law ⇐796

Texas capital sentencing system did not enable jury to consider and give effect to youth as mitigating factor without special instructions. Vernon's Ann.Texas C.C.P. art. 37.071(b-e); U.S.C.A. Const. Amend. 8.

5. Criminal Law ⇐1213.8(8)

Habeas Corpus ⇐498

Error in failure of Texas court to instruct jury in capital sentencing proceeding so as to enable jury to consider and give effect to youth as mitigating factor was not harmless; risk that defendant would be sentenced to death in spite of factors that could call for less severe penalty was incompatible with principles of the Eighth and Fourteenth Amendments. Vernon's

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Ann.Texas C.C.P. art. 37.071(b-e); U.S.C.A. Const.Amends. 8, 14.

Appeal from the United States District Court for the Southern District of Texas.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before REAVLEY, KING and JOLLY, Circuit Judges.

REAVLEY, Circuit Judge:

We have been directed to revisit this case by the Supreme Court, which vacated our prior decision, reported at 854 F.2d 715, and remanded for further consideration in light of *Penry v. Lynaugh*, — U.S. —, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The narrow issue we reach on remand is whether under the Texas capital sentencing system a jury is able to consider and give effect to youth as a mitigating factor without special instructions. We conclude that a jury is unable to do so and therefore vacate Graham's capital sentence.

I.

In remanding this case, the Supreme Court neither expressed nor suggested disagreement with any part of our prior opinion other than that relating to Graham's argument that the Texas statutory sentencing procedure does not allow the jury to consider fully the relevant mitigating circumstances, which is discussed in section IIB of that opinion. Accordingly, with the exception of section IIB, we reinstate our prior opinion.

II.

B.

[1] Capital punishment jurisprudence has progressively refined the constitutional boundaries within which a sentencing jury may impose the death penalty. The general contours of those limits permit imposing a sentence of death only when the crime involves statutorily enumerated aggravating circumstances and after a jury has been able to consider and to give effect to any mitigating circumstances. *See Eddings v. Oklahoma*, 455 U.S. 104, 110–12, 102 S.Ct. 869, 874–75, 71 L.Ed.2d 1 (1982); *Gregg v. Georgia*, 428 U.S. 153, 195–97, 96 S.Ct. 2909, 2935–36, 49 L.Ed.2d 859 (1976). This structure limits the imposition of the death penalty to egregious circumstances and meets the Eighth Amendment requirement of "an individualized assessment of the appropriateness of the death penalty." *Penry*, 109 S.Ct. at 2946.

In *Jurek v. Texas*, 428 U.S. 262, 276–77, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976), the Supreme Court upheld the Texas capital sentencing system against broad constitutional attacks. However, in *Penry*, the Court narrowed the circumstances in which the Texas statute meets the requirements of the Eighth and Fourteenth Amendments. *See Penry*, 109 S.Ct. at 2947–52.

[2, 3] Under the Texas system, a jury sentencing a defendant found guilty of murder under aggravated circumstances must answer the following questions:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex.Code Crim.Proc.Ann. art. 37.071(b) (Vernon Supp.1990). If the jury unanimously answers "yes" to each question submitted, the trial court must sentence the defendant to death. *Id.* art. 37.071(c)-(e). If any question is answered in the negative, the defendant receives a life sentence. *Id.* art. 37.071(e).

The Texas statute's constitutionality has repeatedly turned on the issue of "whether the enumerated questions allow consideration of particularized mitigating factors." *Jurek*, 428 U.S. at 272, 96 S.Ct. at 2956. The statute withstood constitutional attack in *Jurek*, because "three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." *Lockett v. Ohio*, 438 U.S. 586, 607, 98 S.Ct. 2954, 2966, 57 L.Ed.2d 973 (1978) (quoting *Jurek*, 428 U.S. at 272, 96 S.Ct. at 2956 (Stevens, J., plurality)).

In *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), the Court again considered the constitutionality of the Texas system. Franklin claimed his Eighth Amendment rights were violated by the trial court's refusal to instruct the jury on the effect of mitigating evidence under the statute. The case produced a plurality opinion, with Justices O'Connor and Blackmun concurring in the result. Justice White, writing for the plurality, stated that "[i]t is the established Texas practice to permit jury consideration of ' "whatever mitigating circumstances" the defendant might be able to show' in capital sentencing." *Id.* 108 S.Ct. at 2326 (White, J., plurality). He also noted that the only mitigating evidence Franklin offered—his good prison record—could be considered in response to the future dangerousness question. *Id.* at 2329. Justice White further indicated that a state may "channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty," *id.* at 2331,[1] and ultimately concluded that the trial court's refusal to issue special instructions did not violate the Eighth Amendment, *see id.* at 2332.

In her concurrence, Justice O'Connor took issue with the plurality's suggestion that a state could restrict a jury's ability to consider mitigating evidence and underscored the importance of allowing the jury to give effect to mitigating evidence that is "relevant to the defendant's character or background or the circumstances of the offense." *Id.* at 2332-33 (O'Connor, J., concurring). However, Justice O'Connor concluded that the Eighth Amendment did not require special instructions in that case because the evidence of Franklin's good prison disciplinary record could be considered and given effect in answers to the question on future dangerousness. *Id.* at 2333.

The *Penry* Court, however, did find that the statute could be unconstitutionally applied in some circumstances. Like Franklin, Penry had argued that his Eighth

1. Chief Justice Rehnquist and Justices White, Scalia, and Kennedy adhered to this view in the *Penry* dissent, penned by Justice Scalia. *See Penry*, 109 S.Ct. at 2967–69.

Amendment rights were violated by the trial court's refusal to instruct the jury on the effect of mitigating evidence under the statute. However, Penry had offered evidence of his mental retardation and abused childhood as factors mitigating against the imposition of the death penalty, rather than simply a good prison record. *Penry*, 109 S.Ct. at 2952. The distinction between *Franklin* and *Penry* rested upon the relevance of Penry's evidence to his background and its reflection on his moral culpability.

Justice O'Connor, writing for the majority, stressed that "the punishment should be directly related to the personal culpability of the defendant...." *Id.* at 2951.[2] The Eighth Amendment requires consideration of a capital defendant's background and character " 'because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' " *Id.* at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)). In examining the statutory questions that the jury must consider in returning a verdict for death, she found that the jury had insufficient latitude to express its findings regarding culpability. With respect to the first question, Justice O'Connor noted that while the jury was able to consider Penry's mental retardation and abused childhood in answering the questions regarding deliberateness, "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.' " *Id.* 109 S.Ct. at 2949. Thus, the mitigating effects of mental retardation and an abused childhood could not be given full effect in response to this question.

With regard to future dangerousness, the evidence of Penry's mental retardation and abused childhood was viewed as a "two-edged sword." *Id.* One effect of mental retardation is the inability to learn from one's mistakes. Although retardation may diminish blameworthiness, it also makes it more likely that a retarded defendant will be dangerous in the future. A juror could have found both that Penry posed a future danger and that he was less culpable than a person with average intelligence. However, the question provides no vehicle for expressing the finding of reduced culpability. *Id.* The Court also found that the third question provided an inadequate alternative for addressing reduced culpability. *Id.* at 2950. Accordingly, because the evidence was relevant beyond the scope of the special issues, the Court concluded that the statutory questions did not adequately provide the jurors with an opportunity to give a "reasoned moral response" to that evidence. *Id.* at 2952.

We understand the Court's rule after *Penry* to be this: a jury sentencing a capital defendant who provides evidence about his character, his background, or the circumstances of the offense that is relevant to personal culpability beyond the scope of the statutory questions must receive instructions that allow the jury to give effect to such evidence. However, in the *Franklin-Penry* aftermath, we are left with the task of determining which type of evidence mandates special instruction.[3] At the out-

2. The majority with regard to this issue was comprised of Justices O'Connor and Blackmun and the three *Franklin* dissenters, Justices Stevens, Brennan, and Marshall.

3. The Supreme Court has assumed that additional instructions could answer the problem, perhaps by broadly defining "deliberately" in the first jury question. See *Penry*, 109 S.Ct. 2949 and *Jurek*, 96 S.Ct. at 2956 n. 7. We have great difficulty with that assumption and believe it to be necessary to submit another question in order that the jury might give effect to all mitigating factors. See *State v. Wagner*, 309 Or. 5, 28–29, 786 P.2d 93, 106–07 (1990) (en banc) (indicating that Oregon courts are constitutionally required to add a fourth question under a statutory scheme similar to that of Texas). If the jury decides that the defendant, after careful consideration, fully intended to take the life of his victim, how can "deliberately" be "defined" to require a negative answer to the inquiry where the jury also decides that an abused and retarded adolescent should not be put to death for his wrong—even though it was certainly committed "deliberately"? The requested issues in *Franklin* are set forth at 108 S.Ct. 2324 n. 4. The jury would certainly be confused by instructions that seem to be allowing a "no" answer even when the question itself calls for a "yes" answer. And if the instruction should be given, modifying the plain meaning of the question, and if the jury answers "yes," how are we to know that the jury actually considered and rejected all evidence mitigating against the death penalty rather than gave its honest answer to the question that was asked?

set we note that no procedural bar objection has been raised and that the case has been presented for a decision on the merits. Additionally, although Graham's counsel did not request an additional instruction at trial, such a request is not an element of a *Penry* claim. *Mayo v. Lynaugh*, 893 F.2d 683, 688–90 (5th Cir.1990) (suggestion for rehearing en banc pending).

[4] The mitigating evidence that Graham introduced during sentencing included his youth and his difficult childhood. Graham argues this evidence is relevant beyond the scope of the special questions and that, because no additional instructions were given, the Texas statute was unconstitutionally applied in his case. Because of Graham's age, we agree.

Graham was seventeen years old at the time that the murder was committed. His stepfather, Joe Samby, and his grandmother, Erma Chron, testified on his behalf. Samby testified that Graham, who lived and worked with his father, would visit his mother once or twice a week and would help with chores around the house. He also testified that Graham loved his mother, who was currently on medication and was a "nervous type."

Chron testified that Graham began staying with her intermittently, beginning at the age of three, because his mother was hospitalized "at least twenty" times for a nervous condition that Chron classified as mental illness. Graham then went to live with his father at the age of eleven or twelve. Chron further testified that while Graham was living with her, he went to church and school, was never violent, never possessed weapons, and never gave her any problems.

Age has long been considered "one of the individualized mitigating factors that sentencers must be permitted to consider...." *Stanford v. Kentucky*, — U.S. —, 109 S.Ct. 2969, 2978, 106 L.Ed.2d 306 (1989); *see Eddings*, 455 U.S. at 115–16, 102 S.Ct. at 877; *Jurek*, 428 U.S. at 272–73, 96 S.Ct. at 2956–57; *Gregg*, 428 U.S. at 197, 96 S.Ct. at 2936. A jury also must be able to give effect to "evidence of a turbulent family history" in the capital sentencing of a minor. *Eddings*, 455 U.S. at 115–17, 102 S.Ct. at 877–78.

Moreover, age reflects on moral culpability. In *Thompson v. Oklahoma*, the Court restated "the proposition that less culpability should attach to a crime committed by a

juvenile than to a comparable crime committed by an adult." *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 2698, 101 L.Ed.2d 702 (1988) (Stevens, J., plurality); *see id.* at 2708 (O'Connor, J., concurring in the judgment) ("Granting the plurality's other premise—that adolescents are generally less blameworthy than adults who commit similar crimes...."). This conclusion is premised on the notion that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* at 2699 (Stevens, J., plurality). In sum, "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.*

The state argues, however, that Graham was not entitled to a special instruction because the evidence of youth and a difficult home life is not relevant beyond the scope of the statutory questions. The state points out that the relevant problems of adolescents—limited abilities to control impulsive behavior, to evaluate the future consequences of their actions, and to appreciate the possibility and finality of death—can be considered in answering the deliberateness question. That, however, does not end the matter, because a jury that found Graham had acted deliberately might also find him less culpable than an adult. If so, the jury would be compelled to answer the issue affirmatively, and it would be unable to give full effect to Graham's mitigating evidence. *See Penry*, 109 S.Ct. at 2949.

4. The third question was not presented to the jury.

The state further argues that all of the mitigating qualities associated with adolescence are squarely addressed by the future dangerousness question. The state notes that any limitations attributable to adolescence are necessarily transitory. It then argues that a juror finding Graham's moral culpability reduced as a result of his youth could have given effect to the evidence by finding that he did not present a danger in the future. This argument, however, ignores the possibility that a juror could find Graham likely to be dangerous in the future but could also conclude that he was less culpable as an adolescent. If so, that juror could not give effect to the finding of reduced culpability in answering the question.[4] The point of *Penry* is not that a special instruction is unnecessary if a jury could give *some* effect to relevant evidence through the statutory questions; rather, a special instruction is required if a jury cannot give *full* effect to that evidence.

The dissent argues that the mitigating value of youth, without more, is fully covered by the two issues of the Texas verdict. Accordingly, he believes that a special instruction was unnecessary because Graham did not argue that his youth was relevant to any issue other than his future dangerousness and because he did not suggest that his crime was in any way attributable to his youth or to any characteristic associated with his youth.

This view is too restrictive. Adolescence alone is a possible mitigating factor against a sentence of death. The jury was entitled to draw on its common experience and consider the mitigating effect of Graham's youth. A juror who concluded that Graham deliberately committed murder and

posed a future danger but who also concluded that a punishment of death was less justified for him because of his age was not able to give effect to that judgment. Without special instruction under these circumstances, "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 2952.[5]

[5] The state further contends that even if an instruction was erroneously omitted, that error was harmless. We cannot accept that argument. The risk that a defendant will be sentenced to death in spite of factors that "may call for a less severe penalty" is incompatible with principles of the Eighth and the Fourteenth Amendments. *Lockett*, 438 U.S. at 605, 98 S.Ct. at 2965.

The district court's judgment is reversed, and the death sentence is vacated. The cause is remanded to the district court for further orders.

E. GRADY JOLLY, Circuit Judge, dissenting:

I respectfully dissent from the majority's effectively setting aside the death penalty in this case on grounds of what amounts to the failure of the trial judge, sua sponte, specifically to instruct the jury that it was free to grant mercy solely because of the defendant's youth at the time of the offense.

With respect to Gary Graham's youth as a sentencing factor, the jury was presented with nothing more than the fact that he was seventeen years old at the time he committed the offense. That isolated fact, without further development, does not furnish a base upon which a reasonable juror could rationally conclude that Graham bears less moral culpability than other citizens. *See Kelly v. Lynaugh*, 862 F.2d 1126, 1133 n. 12 (5th Cir.1988), *cert. denied*, — U.S. —, 109 S.Ct. 3263, 106 L.Ed.2d 608 (1989).

I do not dispute that age at the time of the offense can be a relevant mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982). The reason that youth can be a relevant mitigating factor is the "recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults." *Eddings*, 102 S.Ct. at 877 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 3044, 61 L.Ed.2d 797 (1979)). Youth can mitigate against imposition of the death penalty because a juror could conclude that a defendant who commits a criminal act *attributable to that defendant's youth* is less culpable than a defendant who has no such excuse, and that such a defendant should not receive the ultimate penalty. *See California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring).

As presented in this case, Graham's youth presented no mitigating factor beyond the scope of the special issues. Graham's youth is obviously relevant to the

5. The dissent understands our ruling to mean that "the jury should have been permitted to exercise a discretionary grant of mercy, notwithstanding Graham's moral or personal culpability, simply because of Graham's youth." However, it is precisely because Graham's youth reflects upon his moral culpability that we believe the Eighth Amendment mandates a jury instruction.

first and second special issues of the Texas statute. In his argument to this court, Graham does not indicate how such evidence had relevance beyond the scope of the special issues. Moreover, during the sentencing phase of his trial, he introduced no evidence that would support such additional relevance. Specifically, Graham's counsel only urged the sentencing jury to consider his youth in deciding the answer to special issue no. 2, whether Graham was likely to pose a continuing threat to society. *See Russell v. Lynaugh*, 892 F.2d 1205 (5th Cir.1989) (Texas statute constitutionally applied when mitigating evidence specifically proffered in context of special issues).

Nor did Graham introduce any evidence to suggest that the murder he committed was in any way attributable to his youth. Furthermore, in his closing argument during the sentencing phase of the trial, Graham's counsel did not even argue that Graham's crimes were attributable to his youth:

> Gary Graham, 17 years old, went on a rage for 7 days. What did he do? He harassed people. He stuck guns in their face[s]. He shot an individual and he killed another individual. What was it in response to? Why did he become so aggressive? What makes an individual go on a rage for 7 days? Drugs? Alcohol? Maybe. Life? Maybe.

In my view, no special instruction is necessary unless there is at least some evidence or argument from which a juror could reasonably conclude that a defendant who commits a criminal act attributable to that defendant's youth is less culpable than a defendant who has no such excuse. *See Penry*, 109 S.Ct. at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)).

Nevertheless, if a juror, even in the absence of any evidence or argument suggesting as much, were convinced that Graham's moral culpability was somehow reduced because his crime was in some unspecified way attributable to his youth, that juror would surely reason that because youth is by nature a transitory condition, Graham would cease to act violently when he outgrew his adolescence. Such a juror would have been able to give full mitigating effect to the fact of Graham's youth by giving a negative answer to the future dangerousness inquiry of the second special issue.

Furthermore, Graham presented no evidence regarding psychological characteristics of his adolescence and their effects on his perceptions and behavior, and points to no such effects in his arguments to this court. Unlike Penry, Graham has made no attempt to relate these factors to his own situation. Here, if a juror believed, even in the absence of any evidence to support such a belief, that Graham, because of his youth, had a limited ability to control impulsive behavior, evaluate the future consequences of his conduct, and appreciate the possibility and finality of death, that juror was free to give a negative answer to the first special issue as well, whether the defendant acted deliberately and with the reasonable expectation that death would result.

Therefore, in my view, the jury was able, without the need for any special instructions, to take into account all of the characteristics associated with Graham's youth, and give that mitigating evidence full effect, in answering the first and second special issues under the Texas statute.

The question is whether the jury instructions provide the jury with a vehicle for expressing a "*reasoned* moral response" to the mitigating evidence introduced by the defendant. *Penry*, 109 S.Ct. at 2952 (emphasis added). The majority fails to identify in the case before us and on the evidence before us how the jury was unable to make a *reasoned* moral response to the isolated and undeveloped fact of Graham's youth. The majority acknowledges that youth is relevant to the first and second special issues, but believes that the jury should have been permitted to exercise a discretionary grant of mercy, notwithstanding Graham's moral or personal culpability, simply because of Graham's youth. In my view, such a response by the jury in this case, where there is no evidence or argument that Graham's crime was attributable to his youth or that any characteristics of his youth have relevance to his personal or moral culpability beyond the scope of the statutory issues, would not be a *reasoned* moral response, but an *unreasoned* response. I cannot agree with the majority that the defendant has a constitutional right to such unbridled jury discretion. The evidence before the jury simply offered no basis upon which a *reasoned* moral judgment would excuse the death penalty in this case.

Finally, the majority's formulation of the *Penry* rule omits any reference to the Supreme Court's statement that the jury must, *upon request*, be given instructions that allow the jury to give effect to evidence about the defendant's character, background, or the circumstances of the crime that is relevant to the defendant's moral culpability beyond the scope of the special issues. *Penry*, 109 S.Ct. at 2945. Graham's counsel did not object to the jury instructions that were given, nor did he request any additional instructions or a fourth special issue. In my view, a request for instructions is an integral part of a *Penry* claim. *Cf. Mayo v. Lynaugh*, 893 F.2d 683 (5th Cir.1989) (suggestion for rehearing en banc pending) "Mayo's counsel satisfied the prerequisites of the claim by offering mitigating evidence at the sentencing phase.").

For the foregoing reasons, I believe that Graham's sentencing jury was fully able to give a "reasoned moral response" to the fact of Graham's youth when it answered the special issues of the Texas statute. Because I believe that the Texas statute was constitutionally applied to Graham, I respectfully dissent.

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APPENDIX E

Gary GRAHAM, Petitioner-Appellant,

v.

James LYNAUGH, Director, Texas Department of Corrections, Respondent-Appellee.

No. 88-2168.

United States Court of Appeals, Fifth Circuit.

Aug. 31, 1988.

Petition was filed for certificate of probable cause seeking stay of execution and habeas relief. The United States District Court for the Southern District of Texas, David Hittner, J., denied relief. Petitioner appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) death sentence did not violate Eighth Amendment; (2) Texas death penalty statute is constitutional; and (3) evidence supported finding that petitioner was competent to be executed.

Petition for certificate of probable cause denied.

1. Habeas Corpus ⇐113(6)

Standard for granting certificate of probable cause requires habeas petitioner to make substantial showing of denial of federal right.

2. Criminal Law ⇐1213.8(8)

Imposition of death sentence on 17-year-old convicted of capital murder in Texas state court did not violate Eighth Amendment. U.S.C.A. Const.Amend. 8.

3. Criminal Law ⇐1213.2(2)

Texas statutory death sentencing procedure, which determines punishment by allowing jury only to answer specific questions, allows jury to consider mitigating circumstances, and thus, does not violate Eighth Amendment. Vernon's Ann.Texas C.C.P. arts. 37.01, 37.071(b); U.S.C.A. Const.Amend. 8.

4. Criminal Law ⇐641.13(7)

Trial attorney in state capital murder trial was not ineffective, although defendant contended attorney construed death penalty statute as precluding consideration of mitigating factors; attorney was not in any way discouraged by statute from presenting mitigating evidence of defendant's psychiatric treatment, but, rather, his decision not to pursue that course resulted from his belief that little convincing evidence existed and that damaging rebuttal evidence would be introduced. Vernon's Ann.Texas C.C.P. art. 37.01; U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐981(1)

Competent evidence supported state court's finding that defendant was competent to be executed.

6. Habeas Corpus ⇐90.3(5)

Habeas petitioner failed to overcome presumption that state trial court's findings that defense counsel was effective were correct. U.S.C.A. Const.Amend. 6.

7. Constitutional Law ⇐270(2)
Criminal Law ⇐1206.1(2), 1213.2(2)

Texas death penalty statute provides proportionality and does not violate Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. U.S.C.A. Const.Amends.

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4-6, 8, 14; Vernon's Ann.Texas C.C.P. art. 37.01.

8. Constitutional Law ⇐221(1, 5), 250.-2(1, 4), 265, 267
Grand Jury ⇐2½
Jury ⇐33(2.1)

Exclusion of 18 year olds and blacks from grand and petit juries in state capital murder trial did not violate defendant's due process and equal protection rights; peremptory challenges against blacks resulted from veniremen's testimony that they were opposed to death penalty and no case law suggested that exclusion of 18 year olds was unconstitutional. U.S.C.A. Const. Amends. 5, 14.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, KING and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Gary Graham, seven years after his conviction in the Texas state courts for capital murder, is before us for the first time and petitions this court for a certificate of probable cause, seeking a stay of his execution and habeas relief under 28 U.S.C. § 2254. We granted a temporary stay of his execution, received briefs, and heard argument so that we could consider his petition more closely. After a thorough review, we are convinced that Graham's contentions are meritless and that he has failed to make any showing of the denial of a federal right. We therefore deny Graham's petition for certificate of probable cause. Nevertheless, in order that the Supreme Court may have an opportunity to consider this case, the temporary stay will not be lifted until 12:01 a.m., September 30, 1988.[1]

I

This habeas corpus petition arises from Graham's conviction in 1981 in Texas state court for the felony offense of capital murder. Graham, who was seventeen at the time of the crime, was represented by two attorneys who developed a defense around mistaken identity. Counsel advised Graham against testifying, and he followed this advice. No alibi witnesses were called, and only two mitigation witnesses testified during the sentencing phase. Graham was found guilty and sentenced to death.

Graham appealed his conviction to the Texas Court of Criminal Appeals. He argued that the trial court improperly excluded five prospective jurors and denied a limiting instruction regarding extraneous offenses. On June 12, 1984, in an unpublished per curiam opinion, the court of criminal appeals affirmed the conviction. It was not until June 26, 1987, however, that the trial court set the execution date. Execution was set for July 30, 1987.

Graham then began these efforts for postconviction relief when he petitioned the Texas state district court. Because the petition was not filed until July 13, 1987, less than three weeks before the scheduled date, execution was postponed to allow time for judicial review. After the district court conducted an evidentiary hearing on January 8, 1988, the court entered findings of fact and conclusions of law recommending denial of relief. The Texas Court of Criminal Appeals then denied relief on February 19, 1988. Graham's execution was then rescheduled for February 25.

1. Cases are pending that may have related issues. *See* notes 2 and 8 *infra*.

Graham filed this petition for a writ of habeas corpus and stay of execution in federal district court on February 23, 1988. The district court found that all relevant facts had been developed by the state court and adopted the state court's factual findings. *See Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). After reviewing Graham's legal contentions, the district court, on the eve of Graham's scheduled execution, determined that his claims were meritless, denied relief and denied a certificate of probable cause.

Graham immediately appealed and asked this court to grant his petition for a certificate of probable cause. We issued an order temporarily staying Graham's execution so that we might have more time to examine his request. *See, e.g., Henry v. Wainwright*, 743 F.2d 761, 762 (11th Cir. 1984). After submission of briefs and oral argument, we now address the questions before us.

II

[1] The standard for granting a certificate of probable cause "requires petitioner to make a 'substantial showing of the denial of [a] federal right.'" *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983) (quoting *Stewart v. Beto*, 454 F.2d 268, 270, n. 2 (5th Cir.1971), *cert. denied*, 406 U.S. 925, 92 S.Ct. 1796, 32 L.Ed.2d 126 (1972)). In the light of this test, we turn to the issues before us.

A.

[2] First, Graham asserts that his death sentence violates the eighth amendment because he was seventeen at the time of the offense. Graham contends that, despite Texas state court and Fifth Circuit precedent to the contrary, this issue is meritorious because recently the Supreme Court has called into serious question the application of the death penalty to teenagers. *Thompson v. Oklahoma*, — U.S. —, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion). Upon reviewing the *Thompson* decision, we find that it offers Graham no help. In a plurality opinion, Justice Stevens concluded that the eighth amendment prohibits the execution of an individual who is under sixteen years of age at the time the crime was committed. *Id.* at —, 108 S.Ct. at 2700. Justice Stevens based the decision upon what he considered to be the current "evolving standards of decency." *Id.* at —, 108 S.Ct. at 2691. The opinion examined the capital punishment policies of all the states and found a consensus that imposition of capital punishment upon someone who is under sixteen years of age is "now generally abhorrent to the conscience of the community." *Id.* at —, 108 S.Ct. at 2697.

Justice O'Connor, although concurring in the judgment, declined to find expressly that a national consensus existed that prohibited the execution of anyone under the age of sixteen. *Id.* at —, 108 S.Ct. at 2704-05. Hence she concluded only that "petitioner and others who were below the age of sixteen at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." *Id.* at —, 108 S.Ct. at 2711.

Neither Justice Stevens' nor Justice O'Connor's opinion bears any suggestion that an individual of Graham's age cannot

be sentenced to death. The evidence relied on in *Thompson* simply reflected a likely consensus among the states that execution of an individual *under the age of sixteen* was cruel and unusual punishment. Neither the holding nor the rationale of *Thompson* supports an argument that the eighth amendment bars the death penalty against persons who are sixteen or older. *See* — U.S. at ——-——, 108 S.Ct. at 2691-96. Thus, *Thompson* does not aid Graham.

Graham fairs no better under Fifth Circuit precedent. This court has specifically observed that "[n]o court has ruled that in all cases and under all circumstances, the execution of those who commit capital offenses while under the age of eighteen constitutes cruel and unusual punishment." *Prejean v. Blackburn*, 743 F.2d 1091, 1098 (5th Cir.1984). Texas state law has similarly held that the capital sentencing of an individual who is less than eighteen years old is not unconstitutional. *Cannon v. State*, 691 S.W.2d 664, 678 (Tex.Crim.App. 1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); *Ferguson v. State*, 573 S.W.2d 516, 525 (Tex.Crim.App. 1978), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2870, 61 L.Ed.2d 304 (1979). There are no special circumstances in Graham's case that indicate that he should be treated any differently from any other seventeen-year-old person who commits the crime of capital murder. We therefore must conclude that Graham's first contention has no constitutional basis.[2]

B.

[3] Graham challenges the Texas death penalty statute, Tex. Code Crim.Proc.Ann. art. 37.01 (Vernon 1981 & Supp.1987), under the fifth, sixth, eighth and fourteenth amendments of the United States Constitution and corresponding Texas provisions. He objects to the statutory sentencing procedure that determines punishment by allowing the jury only to answer specific questions.[3] Tex.Crim.Pro.Code Ann. art. 37.071(b) (Vernon 1981 & Supp.1987). Under the Texas scheme, only two special issues were submitted to the jury: (1) whether the crime was committed deliberately, and (2) whether the defendant is likely to pose a future danger to society. Graham alleges that these questions do not permit the jury to weigh mitigating circumstances when formulating their answers.[4]

Graham's attack upon the Texas statutory sentencing scheme raises issues that are similar to those contained in *Franklin*

2. We are cognizant of the Supreme Court's grant of certiorari in *High v. Kemp*, 819 F.2d 988 (11th Cir.1987), *cert. granted*, — U.S. ——, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). *High* deals specifically with the imposition of the death penalty on a seventeen-year-old defendant. This panel, however, is bound by Fifth Circuit precedent which holds that the execution of a defendant who was aged seventeen when the crime was committed does not constitute cruel and unusual punishment. *See Prejean v. Blackburn*, 743 F.2d 1091, 1098 (5th Cir.1984).

3. He further contends that the statute does not define "mitigating circumstances" and that the trial court failed to instruct the jury on the proper treatment of mitigating circumstances. These contentions are meritless in the light of Supreme Court and Fifth Circuit decisions upholding the constitutionality of the Texas sentencing scheme. *See e.g. Franklin v. Lynaugh*, — U.S. ——, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Riles v. McCotter*, 799 F.2d 947, 952-53 (5th Cir.1986).

4. These mitigating factors introduced at the sentencing phase, included Graham's youth and his difficult childhood.

v. Lynaugh, which, at the time we granted a temporary stay, was pending before the Supreme Court, 823 F.2d 98 (5th Cir.), *cert. granted*, — U.S. ——, 108 S.Ct. 221, 98 L.Ed.2d 180 (1987). The Court granted certiorari on the issue of "[w]hether the jury must be instructed on the effect of mitigating evidence under the Texas capital punishment scheme." The *Franklin* petitioner had requested five jury instructions that would have informed the jury that they should consider all mitigating evidence in answering the Texas statutory questions. — U.S. ——, ——, ——, 108 S.Ct. 2320, 2324, 2325, 101 L.Ed.2d 155 (1988). The requested instructions further stated that the jury could answer the statutory questions in the negative if they found any evidence mitigating against the death penalty. — U.S. at ——, ——, 108 S.Ct. at 2324, 2325. The trial court refused these special jury instructions and Franklin asserted that because the Texas sentencing scheme did not allow the jury to consider the full range of the mitigating evidence, his eighth amendment rights were violated. *Id.*[5]

On June 22, 1988, the court issued its plurality opinion upholding the Texas statute. *Franklin v. Lynaugh*, — U.S. ——, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion). Writing for the plurality, Justice White concluded that the trial court did not violate the eighth amendment by refusing to grant Franklin's requested instructions. — U.S. at ——, 108 S.Ct. at 2331-32. He based this holding on the conclusion that the Texas statutory questions did not prevent the *Franklin* jury from considering mitigating evidence. He stated: "It is the established Texas practice to permit jury consideration of ' "whatever mitigating circumstances" the defendant might be able to show' in capital sentencing...." *Id.* at ——, 108 S.Ct. at 2326. He further noted that Franklin was allowed to present, and the jury allowed to consider, the only mitigating evidence offered, i.e., his good prison disciplinary record. *Id.* at ——, 108 S.Ct. at 2328. Indeed, this particular mitigating circumstance could be considered specifically in response to the Special Issues before the jury because it related to the statutory question of future dangerousness. *Id.* In short, the plurality opinion expressly reaffirmed *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), and thus appears to uphold the Texas statute against any argument that it limits consideration of relevant mitigating evidence.[6] *Id.* — U.S. at ——, 108 S.Ct. at 2331.

Justice O'Connor, although concurring in the judgment of the court, wrote separately, joined by Justice Blackmun. Justice O'Connor's opinion took exception to Justice White's suggestion that a state may limit the sentencing authority's ability to consider mitigating evidence. *Id.* at ——, 108 S.Ct. at 2332. She noted that the Court in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (plurality opinion), held that the state could not prevent the jury "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." She emphasized her view that a

5. The issue of whether the jury can consider "residual doubt" as a mitigating factor was also before the Court in *Franklin*. — U.S. ——, 108 S.Ct. 2320. Graham, however, does not raise this issue and we do not address it.

6. We do note, however, that the conlusion of the opinion might be interpreted to limit its holding to the facts in Franklin's case. *See Franklin*, — U.S. at ——, 108 S.Ct. at 2325.

jury's sentencing decision "should reflect a reasoned *moral* response to the defendant's background, character, and crime," *id.* — U.S. at —, 108 S.Ct. at 2333 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, Jr., concurring) (emphasis in original)), and concluded that a state cannot prevent the jury from considering the full scope of relevant evidence that might mitigate the defendant's culpability for the crime. Justice O'Connor reconciled her broader view with the judgment in *Franklin* by noting that the only mitigating evidence introduced by Franklin was that he had a good prison disciplinary record. Since the jury could consider this mitigating evidence in answering the Special Interrogatory concerning future dangerousness, Justice O'Connor upheld the Texas sentencing scheme as it applied to Franklin. *Id.*

In relating *Franklin* to the instant case, we first note that the plurality opinion, and thus the judgment of the Court, clearly upheld the Texas sentencing scheme. Second, we observe, however, that the evidence relative to mitigation in this case is more similar to *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir.1987), *cert. granted*, — U.S. —, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), than to *Franklin*. There were two mitigating points made to the jury here: (1) Graham was seventeen-years old at the time the crime was committed and (2) he had a difficult family life. Thus, the concerns about the Texas sentencing scheme expressed by Justice O'Connor, that the jury may be prevented from considering the full range of the mitigating evidence as it relates to the defendant's moral culpability, could be directly at issue in this case.

We hold, nevertheless, that the jury's verdict in *Graham* is consistent with the constitutional requirements outlined in *Franklin* and other precedents. Indeed, we are convinced that the plurality opinion in *Franklin* only strengthens past circuit and Supreme Court decisions that indicate that Graham cannot prevail upon his eighth amendment challenge. For instance, *Franklin* reaffirmed *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976), which expressly held the Texas death penalty statute constitutional. *Franklin*, — U.S. at —, —, 108 S.Ct. at 2325, 2328. The plurality opinion cited with approval *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which noted that the Texas statute does allow the jury fully to consider relevant mitigating circumstances.[7] Following these guidelines, this circuit, upon numerous occasions, has concluded that the Texas statute does allow consideration of mitigating evidence, and that the statute is constitutional. *Selvage v. Lynaugh*, 842 F.2d 89, 94 (5th Cir.1988); *Williams v. Lynaugh*, 837 F.2d 1294 (5th Cir.1988), *cert. granted*, — U.S. —, 108 S.Ct. 1000, 98 L.Ed.2d 967 (1988); *Riles v. McCotter*, 799 F.2d 947, 952-53 (5th Cir.1986).[8] We conclude, therefore, that Graham's arguments on these grounds are meritless.[9]

7. Graham also contends that the jury should be informed of the effect of their answers to the sentencing questions. The state court found that the jury *did* advise the jurors of the consequences of their answers and the record supports this finding.

8. We do not suggest that this area of the law is devoid of wrinkles. The Supreme Court has recently granted certiorari in the case of *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert. granted*, — U.S. —, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). In *Penry*, our court closely scrutinized evidence of Penry's mental retardation and concluded that there was some doubt whether the Texas statute permitted this evidence to be considered in answering the sentencing questions. 832 F.2d at 925.

C.

[4] Graham next argues that even if the Texas statute is constitutional, his trial attorney was rendered ineffective because the attorney construed the statute as precluding the consideration of mitigating factors. As indicated by the affidavit of Graham's trial attorney, the attorney was not in any way discouraged by the statute from presenting mitigating evidence of Graham's psychiatric treatment; rather, his decision not to pursue this course resulted from his belief that little convincing evidence existed and that damaging rebuttal evidence would be introduced.[10] The attorney's concern was justified because, as the Supreme Court has noted in *Buchanan v. Kentucky*, — U.S. —, 107 S.Ct. 2906, 2917-18, 97 L.Ed.2d 336 (1987), "if a defendant ... presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant released." Finally, during the sentencing phase, Graham's attorney did obtain mitigating testimony from Graham's stepfather and grandmother concerning his childhood. The evidence reflects no other witnesses who could or would present relevant evidence on Graham's behalf. Graham's present contention that his trial attorney was ineffective because he introduced little mitigating evidence is therefore meritless.

D.

[5] In Graham's fourth contention, he alleges that he is not presently competent to be executed. Graham relies on post-trial reports filed by psychiatrists Dorothy Lewis and Johnathan Pincus and contends that there is evidence of considerable organic impairment, moderate retardation, and psychotic symptoms.

The state court, in examining these contentions, noted that Graham was examined by two psychiatrists at the time of trial and was adjudged competent to stand trial. In reaching its decision that Graham was competent both at trial and presently, the state district court stated that it

> carefully considered (1) all the psychiatric material submitted by both the applicant and the respondent, and (2) the applicant's demeanor and abilities as he testified at the evidentiary hearing held January 8, 1988. While the reports from Dr. Dorothy Otnow Lewis and Dr. Jonathan H. Pincus suggest that the applicant is mildly brain damaged, of low intelligence, and has experienced 'bipolar mood disorders,' there is nothing in the reports or evidence from any other source to indicate that the applicant is either insane or that he does not know the fact of his impending execution and the reason for it.

9. Graham also argues that the Texas statute is unconstitutional because testimony concerning unadjudicated extraneous offenses was allowed during the punishment phase of the trial. In *Williams v. Lynaugh*, 814 F.2d 205 (5th Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987), this court rejected a similar argument and concluded that "admission of unadjudicated offenses in the sentencing phase of a capital trial does not violate the eighth and fourteenth amendments." 814 F.2d at 208. We stand by this decision.

10. Graham's attorney believed that the prosecution's witnesses would testify that Graham was "faking" his mental problems, that he was manipulative of others, and that he had told them it was "O.K. to rob people."

Moreover, the state court found that Graham was examined by Dr. Jerome Brown in January 1987 and found competent to participate in the habeas evidentiary hearing and assist his attorney. Thus the state court held that there was "no credible evidence from any source to indicate that the applicant is not competent to be executed." Under *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 771, 66 L.Ed.2d 722 (1981), the state court's findings must be given a presumption of correctness unless one of the conditions provided in section 2254(d) is established. *See also Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The most relevant consideration listed in section 2254(d) is whether the trial court's factual findings are "fairly supported by the record." Clearly, there is competent evidence supporting the state court's finding that Graham is competent to be executed; indeed, the petitioner cannot seriously argue that there is not. We therefore hold that Graham's contention is meritless.

E.

[6] Graham's fifth contention is that he was denied his right to effective assistance of counsel in violation of his fourth, sixth and fourteenth amendment rights. Graham's particularized grounds are that his counsel:

(1) failed to conduct an adequate pretrial investigation,

(2) failed to interview all the witnesses,

(3) failed to obtain a third psychological-psychiatric examination,

(4) failed to conduct an adequate cross-examination of the state's key witness,

(5) failed to bring forth proper alibi witnesses,

(6) failed to request a limiting instruction concerning extraneous offenses,

(7) failed to develop a proper trial strategy,

(8) failed to provide proper clothing for the petitioner during trial,

(9) failed to call more than two witnesses during the punishment phase of Graham's trial,

(10) failed properly to investigate the alleged extraneous offenses admitted into evidence against Graham,

(11) failed to order an independent psychiatric examination of Graham, and

(12) failed to allow Graham to testify at the guilt/innocence phase or the punishment phase of the trial.

The affidavit submitted by Graham's original defense counsel has a particular bearing on these assertions. The state court credited Graham's trial counsel and determined that Graham's counsel had conducted himself in a competent manner. For example, the state court's factual findings show that Graham's counsel met with Graham on numerous occasions to discuss the case with him. Graham stated only that he did not commit the crime and did not inform his attorney of any witnesses who would support his contention or explain where Graham had been at the time the crime occurred. The state court specifically determined that the alibi witnesses upon whom Graham now relies were never available to Graham's trial attorney. Moreover, the court found that three of the four alleged alibi witnesses did not offer credible testimony.[11] The defense counsel also hired an investigator to interview possible witnesses, and filed a motion for sanity and competency evaluation. It was further found that counsel had valid reasons for failing to request a third independent psychiatric evaluation of Graham.[12] Counsel also used his personal funds to buy Graham suitable clothing for the trial. Counsel further attempted to obtain numerous mitigation witnesses, but only two would agree to testify favorably for Graham. Credited testimony showed that counsel advised Graham that he had the right to testify but counsel's legal view was that Graham would not present himself as a sympathetic witness. Furthermore, the state court determined that the counsel's cross-examination of the state's key witness was not affected by the fact that counsel had attended the same high school. Finally, the court found that the defense counsel had good cause for not objecting to the state's challenge of certain veniremen, and that counsel made a reasonable investigation of certain extraneous evidence admitted during the punishment phase of the trial. In short, the state court found against Graham on every issue of fact upon which he predicated his ineffective counsel claim and concluded that counsel had competently and effectively represented Graham.

Having reviewed the record and the state court's findings of fact, we must conclude that Graham has failed to overcome the presumption that the state court's findings were correct. *See Sumner v. Mata*, 101 S.Ct. at 771. Graham has failed to present a meritorious challenge on this issue.

11. The witnesses submitted a written affidavit over five years after Graham's conviction for capital murder. One witness testified that the affidavit was prepared by a third party and the witnesses only signed the statement.

12. Graham's prior psychiatric evaluations were consistent and showed that Graham was competent to stand trial. This comported with defense counsel's own view of his client's competency.

F.

[7] In Graham's sixth point of error, he makes a broadside attack on the Texas death penalty statute, alleging that it violates the fourth, fifth, sixth, eighth and fourteenth amendments to the Constitution. In particular, Graham maintains that the Texas capital punishment system produces arbitrary results and does not provide proportionality. This contention lacks merit in view of the Supreme Court's holdings in *Franklin v. Lynaugh*, — U.S. —, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). In *Franklin*, although the issue of proportionality was not directly before the Court, Justice White did note that the Texas capital sentencing scheme properly structured jury discretion. — U.S. at —, 108 S.Ct. at 2331. The Court more directly addressed this issue in *Jurek* when it stated:

> Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the even-handed, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution.

96 S.Ct. at 2958. *See also McCleskey v. Kemp*, — U.S. —, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 879, 79 L.Ed.2d 29 (1984). We therefore reject Graham's contentions.

G.

[8] Graham also asserts for the first time that his due process and equal protection rights were violated because individuals under eighteen-years old were statutorily excluded from the grand and petit jury and, in addition, blacks were substantially and systematically excluded. The state court specifically found that the peremptory challenges against blacks resulted from the veniremen's testimony that they were opposed to the death penalty. Since the state court has reviewed the record and concluded that Graham has failed to build a prima facie case of discrimination in either the grand or petit jury selection, we must concur with the state court's decision. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1722, 90 L.Ed.2d 69 (1986); *see also Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 771, 66 L.Ed.2d 722 (1981); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *United States v. Cronn*, 717 F.2d 164, 168 n. 7 (5th Cir. 1983), *cert. denied*, 468 U.S. 1217, 104 S.Ct. 3586, 82 L.Ed.2d 884 (1984).

Finally, we know of no case law which suggests that exclusion of eighteen-year-olds is unconstitutional, and Graham has failed to show how such an exclusion has denied him a fair jury trial. *See Carter v. Jury Commission*, 396 U.S. 320, 90 S.Ct. 518, 525, 24 L.Ed.2d 549 (1970).[13]

III

In conclusion, the petitioner has not made a substantial showing of a denial of a federal right and we therefore must deny his petition for a certificate of probable cause.

However, because the Supreme Court has granted certiorari in *High v. Kemp*, 819 F.2d 988 (11th Cir.1987), *cert. granted*, — U.S. —, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), and *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir.1987), *cert. granted*, — U.S. —, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), we will continue our stay until 12:01 a.m., September 30, 1988, in order to give Graham an opportunity to petition the Supreme Court for certiorari; and, if a petition is filed, this stay shall continue in effect until such time as the Supreme Court has acted.

PETITION FOR CERTIFICATE OF PROBABLE CAUSE DENIED.

13. As a last point of contention, Graham objects to the federal district court's summary dismissal of his claim. He argues that the district court conducted an ex parte investigation without giving him the opportunity to file an answer. Finally, Graham alleges that the district court did not provide him an opportunity to inspect and review all documents that it considered. He contends that these omissions violated 28 U.S.C. § 2254, Rules 4 and 5. These assertions are hollow. Rules 4 and 5 do not bind the district courts in such a manner. In any event, Graham has not shown any prejudice arising from these alleged deprivations.

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APPENDIX F

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
2-24-88
JESSE E. CLARK, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GARY GRAHAM,

Petitioner,

V.

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,

Respondent.

CIVIL ACTION NO. H-88-563

MEMORANDUM ON THE DENIAL OF A
STAY OF EXECUTION AND WRIT OF HABEAS CORPUS

1. Statement

Gary Graham is sentenced to die by injection before sunrise tomorrow, February 25, 1988, and has applied for a writ of habeas corpus and moved to stay his execution. In addition to the pleadings and exhibits filed in this Court, the Court has had before it for its consideration prior to the issuance of this Memorandum and Order the entire 20-volume transcript of the state court proceedings, the transcript of the state court habeas corpus evidentiary hearing held on January 8, 1988, the findings of fact and conclusions of law of the state court, and the opinions of the Texas Court of Criminal Appeals relevant to this case. Both the writ of habeas corpus and stay of execution are denied.

2. Background

Graham was convicted of capital murder and sentenced to death for the shooting death of Bobby Grant Lambert during a

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Court on November 9, 1987, on the issue of whether sentencing a defendant to death, who was 15 years old at the time of the offense, constitutes cruel and/or unusual punishment. See Thompson v. State, 724 P.2d 780 (Okla. Crim. App. 1986), cert. granted, ____ U.S. ____, 107 S. Ct. 1284 (1987). As previously stated, the Petitioner was 17 years of age at the date of the incident in question.

6. Unconstitutionality of the Texas Death Penalty Statute

Graham asserts that he was convicted under an invalid Texas death penalty statute, Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987-88), because jury question number two during the penalty phase of trial improperly "precluded the jury in Petitioner's case from considering various types of mitigating evidence." The United States Supreme Court has recently reaffirmed that the Texas death penalty statute permits "the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator." Lowenfield v. Phelps, 56 U.S.L.W. 4071, 4075 (U.S. Jan. 13, 1988) (citing Jurek v. Texas, 428 U.S. 262, 271-274 (1976)). Therefore, this Court finds Graham's argument is without merit.

Graham also claims that the Texas statute is unconstitutional in that it "rendered trial counsel legally ineffective by forcing him to fail to present relevant mitigating evidence." Graham references the Court to Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987). Additionally, Graham urges that the statute's failure to define mitigating circumstances renders Graham's conviction unconstitutional, citing Franklin v. Lynaugh,

823 F.2d 98 (5th Cir. 1987), cert. granted, 46 U.S.L.W. 3287 (U.S. Oct. 9, 1987).

As Jurek expressly held that the Texas statute is constitutional, this Court also so holds. This Court has also considered Graham's argument regarding the trial court's failure to instruct the jury regarding mitigating circumstances due to the state district court's factual finding that defense counsel failed to object, but finds that Graham has not demonstrated that the charge as a whole was so clearly erroneous as to result in a grave miscarriage of justice. United States v. Varkonyi, 645 F.2d 453, 460 (5th Cir. 1981) (citing United States v. Franklin, 586 F.2d 560, 569 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979)).

7. Petitioner's Present Competency to be Executed

Graham's fourth claim is that he is not competent to be executed under the standard set forth in Ford v. Wainwright, ____ U.S. ____, 106 S. Ct. 2595 (1986).

Although Graham attached psychiatric reports to his petition which were dated June and July, 1986, the most recent evaluation of Graham's competency occurred on August 25, 1987. Dr. Jerome B. Brown found that Graham exhibited "no credible signs of severe psychiatric disturbance or psychological impairment that seems genuine." After the evidentiary hearing on January 8, 1988, the state district court found that there was "no credible evidence from any source to indicate that [Graham] is not competent to be executed."

This Court finds that Graham has failed to make a showing that he is not competent to be executed.

8. Ineffective Assistance of Counsel

Graham suggests that he was denied effective assistance of counsel at the trial because of numerous alleged shortcoming of defense counsel.

A two-prong test for determining ineffective assistance of counsel has been established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). First, Petitioner must show that counsel's performance was deficient which requires "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 680. Second, Petitioner must show that the deficient performance prejudiced his defense such that he was deprived of a fair trial. Id. Further, competency of representation is not to be judged by hindsight or by facts unknown at the time of trial. Id.

Graham alleges twelve separate assertions of purported errors or omissions by his trial counsel team.

A. Graham alleges that counsel failed to conduct an adequate pretrial investigation of the case by failing to interview all of the witnesses and all possible mitigation witnesses. The state district court found that Graham did not furnish counsel with the names or addresses of the potential alibi witnesses. This Court finds that counsel's actions were reasonable based on the information supplied them by Graham at the time.

B. Graham asserts that counsel failed to obtain an independent psychological-psychiatric examination for purposes of mitigation. Defense counsel were not ineffective for failing to request a third psychological evaluation of Graham as both doctors who had previously examined him reached similar conclusions declaring him both sane and competent. See Beans v. Black, 757 F.2d 933, 936 (8th Cir. 1985) (defense counsel's failure to obtain second opinion regarding defendant's competency was not unreasonable under Strickland).

C. Graham claims that counsel Ron Mock knew personally the State's key witness and failed to disclose this personal relationship to Graham. The state district court made the factual finding that Ron Mock did not have any personal relationship with the State's eyewitness, Bernadine Skillern, and that there was no credible evidence to believe that Ron Mock had a conflict-of-interest with his client. This Court finds that Graham has not demonstrated that an actual conflict of interest arose. See Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (citing Glasser v. United States, 315 U.S. 75-76 (1942)) (a defendant who raised no objection at trial must demonstrate that an actual conflict of interest affected his attorney's performance).

D. Graham also asserts that defense counsel was made aware of at least four witnesses who could testify as alibi witnesses. The state district court found that the names and addresses of the four potential alibi witnesses were never given to counsel. This Court has examined the affidavit of counsel

attached to the transcript of the evidentiary hearing held January 8, 1988, and also finds that counsel did not fail to investigate or produce witnesses of which he was informed. This Court finds no indication of ineffective assistance in counsel's actions.

The Court has also considered Graham's additional allegations of ineffective assistance of counsel: "counsel knowingly allowed the petitioner to be tried in the same clothes that he was wearing on the date of his arrest"; "counsel refused to allow the petitioner to testify in his own behalf at the guilt-innocence phase or at the punishment phase"; "petitioner's counsel totally failed to develop a proper trial strategy"; "petitioner's counsel totally failed to request a limiting instruction at the punishment phase of the trial concerning the extraneous offenses which were introduced into evidence"; "petitioner's counsel only called two witnesses to testify in mitigation of the petitioner's punishment"; "petitioner's court-appointed counsel failed to call . . . four witnesses [who] were with the petitioner on the alleged date of the offense"; and "Attorney Mock 'discovered from listening to testimony that one of the robberies committed by Graham took place within a few yards of Mock's house in southeast Houston' according to Houston Chronicle reporter Alan Bernstein." The Court, based upon an examination of the record, finds that all of these allegations of Petitioner are without merit.

9. Unconstitutionality of the Texas Death Penalty Statute

Claim VI of Graham's petition asserts additional grounds for the unconstitutionality of the Texas death penalty statute: (1) lack of "sentence review," (2) lack of comparing death sentences on a state-wide basis resulting in disparity of punishments, (3) lack of trifurcated system, (4) lack of informing the jurors of the result of their answers to the special issues, and (5) admissibility of unadjudicated offenses.

As stated above, this Court finds Jurek, 428 U.S. at 262, controlling and finds the Texas death penalty statute constitutional.

10. Exclusion of Jurors

Graham is a black male who was under eighteen years of age at the time of the commission of the offense. Graham urges that (1) blacks were systematically excluded from the jury panel pursuant to Witherspoon; (2) the Grand Jury was substantially under-represented by blacks and all individuals under 18 were excluded from service; (3) the trial jury was substantially under-represented by blacks and all individuals under 18 were excluded from jury service; and (4) the district attorney prevented the jury from being representative of blacks by his use of challenges for cause and peremptory challenges.

Graham has failed to prove that pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968), blacks were systematically excluded from the jury panel by challenges for cause because allegedly a larger percentage of blacks are against the death penalty.

Graham has also failed to show that the grand jury and the trial jury was under-represented by blacks for any reason. Mere conclusory allegations in an application for federal habeas relief fail to rise to a prima facie showing of discrimination and fail to trigger Batson v. Kentucky. Esquivel v. McCotter, 791 F.2d 350, 351 (5th Cir. 1986) (referencing Batson v. Kentucky, ____ U.S. ____, 106 S. Ct. 1712, 1722-1723 (1986)); see also McClenskey v. Kemp, ____ U.S. ____, 107 S. Ct. 1756, 1766 (1987) (equal protection violation requires showing that decision makers acted with "discriminatory purpose").

Graham has also not shown that the exclusion of all individuals under the age of 18 violated his right to a fair and impartial trial.

SIGNED at 7:10 p.m. on February 24, 1988, at Houston, Texas.

DAVID HITTNER
United States District Judge

TRUE COPY I CERTIFY
ATTEST:
JAMES R. CLARK, Clerk
By Michael Coyne
Deputy Clerk